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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1082

REUBIN O'D. ASKEW, et al.,
Appellants,

-vs-

THE AMERICAN WATERWAYS
OPERATORS, INC., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the district court is reported in *The American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241 (M.D. Fla. 1971). A copy thereof is included herewith in the Appendix (A 39-55).

JURISDICTION

This appeal is from a final order entered in a suit for injunctive relief pursuant to 28 U.S.C. §§ 2281, 2284(3). The order was entered December 10, 1971. Notice of Appeal was filed in the United States District Court, Northern District of Florida, December 23, 1971. Jurisdiction of this Court is invoked in accordance with provisions of 28 U.S.C. § 1253, authorizing appeal from an order of a three-judge court permanently enjoining enforcement of a state statute when such order gives rise to a substantial question such as one involving conflict between state and federal interests. The Court noted probable jurisdiction on April 17, 1972. 40 L.W. 3503.

QUESTIONS PRESENTED

1. Whether the District Court erred in declaring unconstitutional a statute designed to protect the state, its citizens, and its environment from economic and ecological damage resulting from massive pollution of its territorial waters incident to an occurrence during the transport of oil or other substances by sea, on ground that in Article III, Section 2, Clause 3, United States Constitution, the states surrendered to the federal government all power to enact substantive legislation affecting maritime commerce.

2. Whether the District Court erred in construing the Federal Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970); 33 U.S.C. § 1161 et seq. as preempting the states from enacting legislation imposing absolute and unlimited liability upon owners or operators of vessels or terminal facilities which cause massive pollution of the state's territorial waters by oil or other substances.

STATUTES INVOLVED

Chapter 70-224, Laws of Florida, 1970, published as Chapter 376, *Florida Statutes* (1970), is too lengthy for inclusion verbatim, and is set out in the Appendix (A 56-73).

Chapter 16B-16.08, Regulations, Department of Natural Resources, State of Florida, promulgated in accordance with Chapter 70-244, §§ 7, 14, Laws of Florida, 1970, is set out in the Appendix (A 73-74).

The Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session (April 3, 1970), Codified as 33 U.S.C. § 1161 et seq. is also set out in appropriate part in the Appendix (A 75-90).

The Limitation of Liability Act, originally Chapter 43, Section 3, 9 Stat. 635 (March 3, 1851), amended and codified as 46 U.S.C. § 183 (1964) is set out in the Appendix (A 91-92).

46 U.S.C. § 189

§ 189. Limitation of liability of owners of vessels for debts

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. June 26, 1884, c. 121, § 18, 23 Stat. 57.

The extension of Admiralty Act, 62 Stat. 496 (June 19, 1948), 46 U.S.C. 740, is set out in the Appendix (A 93).

Article III, Section 2, United States Constitution, the Fifth Amendment to the United States Constitution, the Ninth Amendment to the United States Constitution, and the Tenth Amendment to the United States Constitution are set out in the Appendix (A 94).

28 U.S.C. § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.

STATEMENT OF THE CASE

The Water Quality Improvement Act of 1970, Pub.L. 91-224, 91st Congress, 2d Session, 33 U.S.C. § 1161 *et seq.* (hereafter "W.Q.I.A." in citation; "Federal Act" in text) became law April 3, 1970, while the Florida legislature was in annual session. The Federal Act prohibits the discharge by vessels of oil into navigable waters of the United States or the contiguous zone. W.Q.I.A. § § 11(a), (b), *et seq.* Should such a discharge occur through willful negligence or willful misconduct within privity or knowledge of the owner or operator of the vessel, the government may recover the entire clean-up cost from the owner or operator. W.Q.I.A. § 11(f)(1). If a discharge occurs other than from willful negligence or misconduct, the government can recover clean-up costs unless the owner or operator can prove any of four defenses: act of God, act of war, negligence on the part of the government, or act or omission of a third party. W.Q.I.A. § 11(f)(1).

This strict liability is not without limitation, however, Recovery is limited to $100 per gross ton of the vessel or $14 million, whichever is less. W.Q.I.A. § 11(g). Consequential damages, or costs imposed by such a discharge on other than "the government," are not recoverable under the Federal Act.

The Federal Act also requires owners of vessels of more than 300 gross tons using United States ports or navigable waters to establish and maintain evidence of financial

responsibility equal to the aforementioned limits by insurance, surety bonds, qualification as a self-insuror, or other means. W.Q.I.A. § 11(p)(1). In the event of a discharge, the government may proceed directly against the insuror who has benefit of all defenses available to the vessel owner or operator. W.Q.I.A. § 11(p)(3).

Section 11(o)(2) of the Federal Act reads:
Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement of liability with respect to the discharge of oil into any waters within such State.

The Florida Oil-Spill Prevention and Pollution Control Act, Chapter 70-244, Laws of Florida, 1970; Chapter 376, Florida Statutes (1970) (hereafter referred to in citation by chapter number and in text as "Florida Act") was a Committee Substitute for Senate Bill No. 450 (A 56-73). It passed the legislature less than 90 days after the Federal Act became law, was approved by the Governor June 30, 1970, and took effect in part the following day (A 73). Provisions of the Federal Act were fresh in the minds of committee members. Federal-State cooperation is keynoted throughout the State Act.

The legislature further declares that it is the intent of this act to support and complement applicable provisions of the federal water quality improvement act of 1970[1] specifically those provisions relating to the national contingency plan for removal of oil and other pollutants. Ch. 71-244, Laws of Florida, 1970, § 2(6).

Nothing in this act shall affect in any way the right of any person who renders assistance in containing or removing oil or other pollutants to reimbursement for costs of such containment or removal under the applicable provisions of the federal water quality improvement act of 1970[1] or any rights which said person may have against any third party whose acts or omissions in any way have caused or

[1]33 U.S.C.A. § 1151 et seq.

contributed to the discharge of such oil or other pollutants. Ch. 70-244, Laws of Florida, 1970, § 8(5).

This act, being necessary for the general welfare, the public safety of the state and its inhabitants, shall be liberally construed to effect the purposes set forth under this act and the federal water quality improvement act of 1970.[1] Ch. 70-244, § 21, Laws of Florida, 1970.

Limitations of the Federal Act were also fresh in the minds of state legislative committee members who recognized gaps in protection afforded by the Federal Act, and sought to fill those gaps with safeguards peculiarly necessary to Florida. Instead of liability limited by gross tonnage of an offending vessel up to an arbitrary ceiling for pollution by oil alone, the Florida Act imposes unlimited liability without fault upon vessels discharging other pollutants as well as oil while destined for or leaving any Florida port. Ch. 70-244 § 12, Laws of Florida, 1970. Instead of recovery limited to clean-up costs of the State alone, the Florida Act provides for damages "resulting from injury to others." Ch. 70-244, § 12. Terminal facilities, whether onshore or offshore, are subject to the same liability as vessels. Ch. 70-244, § 3(9). Owners and operators are liable, Ch. 70-244, § 12, and must maintain satisfactory evidence of financial responsibility measured by $100 per gross ton of the largest vessel up to a $5 million ceiling as opposed to the $14,000,000 limit in the Federal Act. Ch. 16B-16.08, Regs. Department of Natural Resources, State of Florida; Ch. 70-244, §§ 7, 14. (A 73-74). Special containment gear and crews trained in use thereof are required, Ch. 70-244, § 7(1)(a), and vessels are subject to inspection by state officials to ascertain presence of such gear and to assess seaworthiness of the ship prior to entry into any Florida port. Ch. 70-244, § 7(c).

The effective date for regulatory requirements of the Florida Act, including financial responsibility and unlimited and absolute liability provisions, was extended by the Board of Natural Resources to March 15, 1971.

Suit was filed March 9, 1971, and a hearing on plaintiffs'

[1] 33 U.S.C.A. § 1151 et seq.

application for temporary restraining order was held March 11-12, 1971.

Plaintiffs and intervenors include merchant shippers, world shipping associations which insure an estimated three-fourths of the world's tonnage, certain members of the Florida coastal barge and towing industry, and owners and operators of oil terminal facilities and heavy industries located in Florida ports.

Defendants are members of the Cabinet of the State of Florida, before the Court in dual capacities. They were sued in their official position as highest elected officers of the state, and they were sued as members of the Board of Natural Resources. Also included are the director of the Department of Natural Resources, and a conservation officer. The State of Florida intervened as a party defendant on ground that interests to be adjudicated were much broader than those protected by the Department of Natural Resources.

At the two-day hearing on plaintiffs' application for temporary restraining order, testimony of plaintiffs' representatives revealed that not one of them had attempted to comply with the Florida Act or regulations issued thereunder, but that shippers had advised them that vessels would be diverted from Florida ports if the Act were implemented. Indeed, certain vessels had in fact been diverted to ports in other states. Testimony of an employee of the Department of Natural Resources was to the effect that some 669 vessels had been approved for traffic to and from Florida ports, their owners or operators having complied in advance with financial responsibility requirements. The temporary restraining order was subsequently entered *nunc pro tunc* to March 12, 1971.

The three-judge panel was convened and heard this cause on April 27, 1971. Judgment of the District Court was entered December 10, 1971, with a memorandum opinion finding (1) that maritime law 'evolved' under Article III, Section 2 of the United States Constitution, augmented from time to time by the federal judiciary, and changed further by congressional enactment, such as the Water Quality Improvement Act of 1970; (2) that the Federal Act is 'tangible evidence' that the Florida Act is an unconstitutional intrusion

into the federal maritime domain because it makes changes in substantive maritime law such as providing absolute and unlimited liability for owners and operators of offending vessels, and because it also contains provisions for compensating state and private parties for property damage as well as clean-up costs; (3) that oil-spill pollution is a maritime tort governed strictly by rules of admiralty law and is exclusively within the federal domain; (4) that since the Florida Act substitutes absolute and unlimited liability for admiralty's negligence and unseaworthiness tests and severely limited liability, it contravenes federally protected tenets of maritime law and is invalid upon the authority of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); (5) that to permit Florida to legislate in such fashion would be to 'sound the death knell to the principle of uniformity'; (6) that limited remedies and relief available under the Federal Act notwithstanding, Congress did not leave 'gaps' in oil-spill pollution laws for the states to fill in—even though the Federal Act fails to provide a remedy, the states are nonetheless precluded from creating one—under authority of *Moragne v. United States Lines, Inc.*, 398 U.S. 375 (1970); (7) that the preemption disclaimer of Section 11 (o)(2) of the Federal Act does not mean what it says because Congress lacks power to permit states to legislate requirements or liabilities with respect to discharge of oil within state waters when such legislation might tend to affect—or conflict with established rules governing—maritime commerce, on authority of *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920), *The Lottawanna*, 21 Wall. 558 (1875) and *The Steamer St. Lawrence*, 1 Bl. 522 (1862); and (8) that the Florida Act must fall in its entirety, despite a severability clause, because, absent fatally defective provisions, the Act 'would not comprise a coherent legislative scheme,' a point that will not be disputed on appeal.

Notice of Appeal was filed with the United States District Court, Middle District of Florida, on December 23, 1971, and probable jurisdiction noted on April 17, 1972.

SUMMARY OF ARGUMENT

I.

A. The essential question to be decided here is to what extent a state, in the exercise of its police power, may legislate to control, establish responsibility, and assess liability for massive oil-spill pollution of its territorial waters. The District Court ruled that Florida was precluded from passing any legislation which would have an adverse effect upon or otherwise interfere with established tenets of general maritime law, and that, as to oil-spill pollution laws, Congress had preempted the field by passage of the Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C. § 1161 *et seq.* (Federal Act). But the Florida Oil Spill Prevention and Pollution Control Act of 1970, Ch. 70-244, Laws of Florida, 1970; Chap. 376, Florida Statutes, (Florida Act) is a valid expression of the State's police power, protecting dominant State interests not otherwise protected under (a) maritime law, or (b) the Federal Act. Moreover, the Federal Act expressly disclaims preemption. 33 U.S.C. § 1161(o)(2).

(1)

Necessity for conserving supplies of fresh water are urgent. In the United States, approximately 650 billion gallons of water are available for use per day. By the year 2000, it is estimated that our consumption of fresh water will increase to 1000 billion gallons per day. It has been suggested that it will be necessary to re-cycle water as we do glass and aluminum, and to refine our desalinization processes, if we are to continue to exist as an American civilization.

The public was just becoming aware of the water crisis when the 60,000 gross ton tanker *Torrey Canyon* ran aground and spilled half its cargo, an estimated 450,000 barrels of crude oil, into the English Channel. World-wide attention was focused on efforts of Great Britain and France to control and abate the massive oil-slick. The R.A.F. finally bombed the wreck, and cleanup costs alone to France, Great Britain, and the States of Guernsey were more than $16,000,000. In a

limitation proceeding under 46 U.S.C. § 183, owners of the *Torrey Canyon* limited their liability to $50, the value of one remaining life boat.

(2)

Had the Federal Act controlled the *Torrey Canyon* disaster, claimants would still have found themselves more than $10 million short. That Act limits liability to $100 per gross ton or $14,000,000 *whichever is lesser*. Had the stranding occurred in the contiguous zone, the discharge of oil would probably not have constituted a violation under the Act in any case. Had the Florida Act controlled, not only would cleanup costs have been compensable, but owners of the *Torrey Canyon* would have been exposed to claims from private-owner damages to shore-front property as well. At 118,000 deadweight tons, the *Torrey Canyon* is less than half the size of super-tankers afloat today and dwarfed by 500,000 to 800,000 ton giants on the drawing boards. The Florida Act reflects natural concern for this State's vulnerable coastline. Damages to the ecology from a massive oil-spill are incapable of final measurement for a long period of time following the event, but adverse effects may be predicted with reasonable accuracy based upon previous spills. Aside from destroying the food chain and immediately killing fish and seabirds, there are more dramatic effects. For example, when the tanker *P.W. Thirtle* grounded off Newport, Rhode Island, 31,000 gallons of crude oil were discharged in an effort to refloat her. This is said to have resulted in virtual destruction of the entire oyster fishing industry of Narragansett Bay.

Concern for ecology and economy of the State reached a peak in mid-February, 1970, when the tanker *Delian Apollon* ran aground, spilling 21,000 gallons of Bunker 'C' oil into Tampa Bay. It formed a slick estimated to be 100 square miles in size, and cost nearly $1.5 million to clean up, the amount of settlement in a suit filed by the State of Florida. Against this background, aware of limitations in the Federal Act, the Florida legislature passed the State Act. It takes up where the Federal Act leaves off.

B. The District Court found that the Florida Act violated Article III, Section 2, United States Constitution, in that unlimited and absolute liability of the Act conflicted with (a) general maritime law, and (b) provisions of the Federal Act. But the thrust of the Florida Act is to provide a remedy for non-maritime interests who are damaged *on land* by an occurrence within territorial waters; i.e. a beach-front resort and peripheral businesses dependent upon tourism attracted to Florida by clean air, beaches, and climate. It is also designed to protect aquafarming projects and commercial fishing enterprise within the State's territorial waters. Is there any limitation to interests protected by the Florida Act? Should an arbitrary limitation be imposed, measured by the value of the vessel after it went down? Why should all public and private interests of the State who are adversely affected by a massive oil-spill be subject to frustrations of the Limitation of Liability Act? E.g. *In re Barracuda Tanker Corp.*, 281 F.Supp. 228 (S.D.N.Y. 1968) modified, 409 F.2d 1013.

The Florida Act subjects shippers to absolute and unlimited liability for damage resulting from a spill, and requires them to demonstrate evidence of financial responsibility in an amount satisfactory to the State Department of Natural Resources before calling at Florida ports. Maritime interests, claiming that inability to purchase insurance for an unlimited amount precluded their doing business in the State, filed suit contesting validity of the Act. They admitted that they had made no attempt to comply with the Act. A State employee testified during the TRO hearing, that 28 maritime companies had shown satisfactory financial responsibility, clearing 669 ships for traffic to and from Florida ports. It is conceded that maritime interests prefer to sail fully insured against all contingencies, and that unlimited liability precludes insurance alone as a means of showing financial responsibility, but this should not sustain an argument going to constitutionality of the Florida Act.

In hearings before the congressional committees considering the Federal Act, maritime interests attacked absolute liability as being inequitable in view of the fact that marine disasters were often unavoidable, i.e., striking a mine, or being caught

in a hurricane. Ships in innocent passage, goes the argument, should not be deemed responsible for results of an accident caused by an unforseen force. But this argument overlooks the fact that in most instances, ship and cargo are heavily insured, and that the ship would not be in hurricane latitudes in the first place were it not for profits derived from the voyage to (a) the owner of the bottom whose mortgage is being paid by the time-charter, (b) the charterer, whose leased tanker-fleet may have been on a course charted by (c) an operator, a subsidiary of (d) the cargo-owner, a major petroleum company. Profit is behind all of the motives that got the vessel into the storm in the first place, and that profit-margin takes into account loss by unavoidable accident. It is the non-maritime property-owner ashore who is truly the innocent party. Why should he or the public fisc assume liability for any or all of the maritime parties noted above? The argument also ignores modern concepts of tort law, that liability should fall upon the party in the best position to bear the loss or distribute the risk. In this context that party is the vessel or cargo owner or both agencies together, since they profit from the carriage contract, appreciate the full risks involved, and are in the best position to insure against them.

C. (1) The Florida Act is a valid expression of the state's police power. If the State cannot protect its citizens and property from ravages of oil-spill pollution caused by ships calling at its ports, then it has failed to meet an essential responsibility of government. Without unlimited and absolute liability, such protection is not afforded.

Maritime interests argue that since they may lawfully store, use, and transfer pollutants in the course of their lawful business, they should be liable only for negligence in its operation. If they can demonstrate no negligence, they should suffer no liability. To this, the citizen responds: 'I also own my property and have a lawful right to enjoy it and a clean environment. I did nothing to cause the spill of pollutants into state waters. You are blameless of negligence. Yet the waters are polluted, the air is fouled, our beaches smeared, and my business is ruined as the result of a discharge from operation of your agency, albeit careful and cautious and

prudent. Why should I be denied redress even though I have done nothing to bring about this discharge?' (Paraphrased from *St. Louis & San Francisco R. Co. v. Mathews*, 165 U.S. 1 (1896), a case involving sparks from passing locomotives rather than oil from passing vessels, but analogous to the equitable argument in the case at bar.)

The Florida Act makes those who traffic in pollutants responsible for damage to property and the environment which those pollutants cause upon discharge into state waters. To deny the State's competency to do this is to assert that the ultimate burden for oil-spill pollution is properly that of the private citizen or the public treasury rather than those whose instrumentality caused the discharge. The police power of the State is peculiarly appropriate to the object sought by the Florida Act.

Berman v. Parker, 348 U.S. 26 (1954) describes the breadth of the police power. *Huron Portland Cement C. v. City of Detroit*, 362 U.S. 440 (1960) approves its application in a maritime commerce context. Mechanics of the Florida Act are necessary to its enforcement, i.e., provisions for maintaining financial responsibility; requiring certain containment gear; requiring minimum sea conditions for entry and unloading; provisions for boarding and inspection. This Court has sanctioned such mechanics in one form or another in a line of cases beginning with *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299 (1851). The District Court's failure to recognize the Florida Act as a legitimate exercise of the State's police power led it to err.

(2)

Powers to provide protection described in the Florida Act were reserved to the states in the Tenth Amendment. The Tenth Amendment contemplates a conflict of power between the state and Federal domains. But, the District Court's treatment of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), tends to establish admiralty as a third, autonomous sovereignty, impervious to influences of either state or

national governments. This case should not add to the legend. Article III, Section 2 is, on its face, simply a delegation of judicial power over *cases* of admiralty and maritime jurisdiction. It has now been so broadened as to authorize congressional action extending substantive maritime law far beyond its original limits.

The Florida Act speaks to sea-to-shore and, hence, non-maritime, torts. Oil-spill damages described in the State Act are consummated on land. Hence, admiralty jurisdiction would not have arisen at all, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *Ex parte Phenix Ins. Co.* 118 U.S. 610 (1886); *The Thomas Jefferson,* 23 U.S. (10 Wheat.) 428 (1825), had it not been for the Admiralty Extension Act of 1948, 62 Stat. 496, 46 U.S.C. § 740. But, see *Richardson v. Harmon*, 222 U.S. 96 (1911), an anomaly.

D. (1) But in extending admiralty jurisdiction to land, Congress over-stepped the constitutional grant of Article III, Section 2. That provision has been judicially determined to speak to torts only if they occurred on navigable water. *The Genesee Chief,* 53 U.S. (12 How.) 443 (1851). Since congressional authority for extending maritime jurisdiction relies exclusively upon the Admiralty Clause, *The Genesee Chief; The Eagle,* 75 U.S. (8 Wall.) 15 (1868); *American Ins. Co. v. Canter,* 26 U.S. (1 Pet.) 511 (1828), and congressional power can only be as extensive as Article III, Section 2, then the Court becomes the surveyor determining how far that power may extend. Congress cannot extend it beyond this Court's interpretations of Article III, Section 2, without exercising a judicial function. In the case of torts, substantive federal jurisdiction is measured by *locality*; if the tort occurs on navigable water it is a maritime tort. *Victory Carriers, Inc. v. Law*, 404 U.S. , 30 L.Ed. 2d 383 (1971), reminds us that the locality test was settled law 50 years ago. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922), In extending maritime tort jurisdiction over sea-to-shore torts beyond navigable waters, Congress has rendered admiralty law amphibious; locality means nothing. Congress has also construed the Admiralty Clause in a manner inconsistent with this Court, exercising a super-judicial function. *The Steamer*

St. Lawrence, 66 U.S. (1 Black) 523 (1861); *The Belfast*, 74 U.S. (7 Wall.) 624 (1868); *Crowell v. Benson*, 285 U.S. 22 (1931). The Admiralty Extension Act is invalid.

(2)

But, if the Admiralty Extension Act is not unconstitutional, states are still free to enact substantive law in matters maritime. The extension of admiralty jurisdiction to land was not exclusive. Legislative history clearly shows that the Act signified no intrusion into common law preserves of the Saving Clause. Admiralty is not exclusive within the maritime tort context. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Strict principles of uniformity are not applicable here, *Just v. Chambers*, 312 U.S. 383 (1941), and the state may still act substantively in the field of maritime tort remedies. There is no authority for suggesting that the state has lost its concurrent jurisdiction over maritime torts. *The Hamilton*, 207 U.S. 398, (1907); *Taylor v. Carryl*, 61 U.S. (20 How.) 583 (1857).

(3)

The Constitution recognizes an individual's fundamental right to a healthful environment. This right, though not enumerated, was retained by the people in the Ninth Amendment. Certainly there is a guarantee to a healthy environment as fundamental as the penumbral right to privacy. E.g., *Griswold v. Connecticut*, 381 U.S. 79 (1965). In the Florida Act, this guarantee is secured against continuing assaults of oil pollution of the seas. People of Florida had a right to take up statutory arms in defense of their environment.

E. The Jensen Doctrine is inapplicable to an attack against the Florida Act. *Southern Pacific Co. v. Jensen* sets out a hide-bound principle of uniformity necessary only to certain matters maritime which the District Court mistaken applied ouside the arena of *Jensen's* facts, *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1942), despite language of the Jensen

Case itself which impliedly precludes its application into the common law area of torts. 244 U.S. at 218.

F. (1) Limitation of liability should not be applicable to a sea-to-shore tort, despite *Richardson v. Harmon*, 222 U.S. 96 (1911), which extended the Limitation of Liability Act, 46 U.S.C. §§ 181-189, to a non-maritime tort. If that case is of sufficient vitality to reach sea-to-shore tort actions arising out of an oil-spill, then it will frustrate (a) fair recovery of cleanup costs by other agencies than the Federal government, and (b) private property owners' recovery in common law actions. Reasons underlying codification of the concept of limited liability never contemplated severe damage to shore property inflicted by a massive oil-spill. Continued protection of maritime interests to the detriment of the state and its citizens is no longer justified in an era of sophisticated maritime insurance and super-tankers. It is apparent that limitation proceedings would not protect ship-owners from claims of the United States arising under the Federal Act. Why should limits imposed by 46 U.S.C. § 183 be resurrected to preclude a non-Federal claim?

(2)

History of limitation of liability further demonstrates its inappropriateness to an oil-spill context. Designed to protect ship-owners from claims of cargo-owners and passengers, it was never conceived to thwart just claims of persons not *in privity* with maritime commerce. Its application to *Torrey Canyon* cleanup claims, *In re Barracuda Tanker Corp.*, 281 F.Supp. 228 (S.D.N.Y. 1968) *modified*, 409 F.2d 1013 (2d Cir 1969), shows how inequitable its extension to this context would be. Moreover, its applicability to torts consummated on land is unconstitutional in that (a) it extends admiralty and maritime jurisdiction beyond the *locality* of navigable waters, and (b) has the effect of depriving damaged property owners of their property without substantive due process of law in violation of the Fifth Amendment to the United States Constitution. Limitation of liability is strictly a creature of an act of Congress. It is no less an arbitrary deprivation of

property than it would be if owners of the ship took control of the ruined beachfront under authority of a Federal statute. *Cf. United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950). While the hotel-owner whose business is ruined has his day in court as a result of limitation proceedings, it is form without substance; that he will be denied full compensation for his loss is fore-ordained. To apply it in this context is a perversion of the remedy which the Limitation of Liability Act was designed to provide. This unconstitutional application of an ancient tenet of maritime law should not be affirmed as a legitimate frustration of the states' police power.

II

A. Just as maritime law should continue to develop in a reasonably consistent pattern, so should states take appropriate measures to assure protection of their citizens, economy, and ecology from massive oil-spills. Despite obvious conflict in this case, these ambitions are not mutually exclusive. That they clash at all is because the District Court interpreted the apparent conflict raised by the complaint in absolute terms of hornbook dogma, willing to uphold abstract tenets of "uniformity" to the detriment of the State and its citizens. The position of the State is, however, that the Florida Act should be judged not by its asserted conflict with narrow principles of maritime law, but by its response to the Federal Act.

(1)

Analysis of both Federal and State Acts indicates that, while they partially overlap in territorial application, the former is not restrictive of the other. Rather than competition in regulation of maritime commerce, the two Acts speak to *Federal-State cooperation* in meeting the threat of oil pollution of coastal waters. Although the Florida Act provides unlimited and absolute liability while the Federal Act provides certain defenses and limits liability, there is no antagonism between conflicting jurisdictions. Liability under the Federal

Act attaches only to cleanup costs incurred by governmental agencies. Under the State Act, liability is measured by the actual cleanup costs to the State *and* to damage claims by private citizens. The primary responsibility of the government the Federal Act is in coordinating response of State and Federal teams to a maritime disaster threatening pollution of coastal waters. In the National Contingency Plan, the Federal Act contemplates close cooperation between State and Federal agencies to combat a mutual nemesis. There is a strong implication in the Federal Act that court proceedings arising thereunder are not within the province of maritime law at all; i.e. express grant of jurisdiction to the Federal judiciary which would be unnecessary had Congress deemed the Federal Act to be a part of general maritime law, and, as noted, liability measured by tonnage up to $14,000,000 with no reference to, or room for, limitation proceedings under 46 U.S.C. § 183.

Moreover, in 1161(o)(2), the Federal Act expressly disclaims preemption of States from providing "any requirement or liability with respect to the discharge of oil into any waters within such State." Surely this speaks to state substantive law. The District Court erred in finding that in that Section, Congress did not mean what it said because *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) precludes such delegation of authority to state legislatures. To frustrate the clear expression of Federalism contained in the Federal Act on authority of *Knickerbocker Ice* is to overlook (a) the limited purposes for which that case was decided (based upon necessity for upholding the Jensen Doctrine, already shown to be inapplicable here), and (b) the strong dissent of Mr. Justice Brandeis, particularly appropriate to the instant contoversy, in *Washington v. W.C. Dawson & Co.*, 264 U.S. 218 (1924).

(2)

A review of the historical development of Federalism in the United States describes reason for its emphasis in this case. To hold that states are precluded from exercising their Federalist responsibilities—so clearly contemplated in the Federal

Act—merely to extend the abstraction of "uniformity" beyond confines of the Jensen context, would be contrary to previously cited authority of this Court, inconsistent with the clear intent of Congress in the Federal Act, and a denial of the police power of the State.

(3)

The District Court noted that, as to arguments raised by Florida that the State Act filled gaps deliberately left by Congress in the Federal Act, the "gap" theory had been put to rest by *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), a case the State of Florida respectfully suggests is inappropriate to the instant controversy. In so doing, the District Court overlooked this Court's opinions in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and *Chevron Oil Co. v. Huson,* U.S. ,30 L.Ed. 2d 296, (1971). The "gap" theory is an integral part of Congress' expression of Federalism in the Federal Act, and should be affirmed as such by reversal of the judgment of the District Court.

ARGUMENT

I.

The fact that judicial power of the United States is extended "to all Cases of admiralty and maritime jurisdiction" by Article III, Section 2 of the Constitution does not impose a permanent barrier in the path of State legislatures seeking to protect citizens, property, ecology, economy and general welfare from the deleterious effects of massive oilspill pollution of state waters.

A. Preliminary Statement

"Pollution has been defined as '. . . any substance added to the marine environment as a result of man's activities which has a measurable and generally detrimental effect upon the environment.' Ketchum, **Man's Resources in the Marine Environment,** *in Conference on Pollution and Marine Ecology 1, 3 (1967). The majority of oil pollution is caused by persistent oils, that is, crude oil, fuel oil, heavy diesel oil, and lubricating oil. These oils persist for months on the surface of the sea and are capable of being carried considerable distances by currents, winds, and surface drifts."*[1]

Issues rising here are as subtle as they are varied. They reach across key provisions of the Constitution, to be discussed below, and involve decisions of this Court which track development of (a) maritime law, and (b) our federal system of state and national priorities. Ultimately, consideration of these issues leads to a bed-rock question of national and, perhaps, international consequence: the extent to which a state, in the exercise of its police power, may enact legislation to control, establish responsibility, and assess liability for oil-spill pollution of its territorial waters. The thrust of the District Court's order is that it cannot do so in any case; that in certain constitutional provisions states have irrevocably surrendered this power to the Federal domain; and that several statutes enacted under authority of these

[1] Comment, *Oil Pollution of the Sea*, 10 Harvard International Law Journal 316, (Spring 1969), fn. 1.

constitutional provisions preempt the field of (a) water quality control as it relates to oil-spill pollution, and (b) all matters maritime.

It is Florida's position that its Oil Spill Prevention and Pollution Control Act of 1970[2] (hereinafter the Florida or State Act) is not such an onerous intrusion into federal maritime law as the Court below found it to be. To the extent that friction between the state and the maritime province occurs, however, Florida's position is firmly fixed upon the high-ground fact that it has not only a right but a duty to protect the health and welfare of its citizens, and that, in a collision between this duty and prerogatives claimed under maritime law, it is the latter that must give way to the former.

This, of course, presumes that the State Act is a valid exercise of the police power. Florida contends that it is unless Congress has preempted the field in the Water Quality Improvement Act of 1970[3] (hereinafter the Federal Act). The District Court held that the Federal Act does in fact preempt the field. But Congress, and the State of Florida, disagree.[4]

Any exercise of the police power implies a certain urgency. It is helpful to view the Florida Act from the perspective of urgency that prompted its passage.

Dominant state interests are at stake here: conservation of water as a natural resource, the right of its citizens to an unpolluted environment, and the right of its citizens to the full use and enjoyment of their property. The Legislature of the State of Florida determined that these rights and resources were fundamental and compelling, and were endangered by continued assaults of marine pollution. The

[2]Ch. 70-244, Laws of Florida, 1970; Chapter 376, Florida Statutes.
[3]Pub.L. 91-244, 91st Congress, 2d Session (Apr. 3, 1970), 84 Stat. 91; 33 U.S.C. § 1161 *et seq.*
[4]33 U.S.C. § 1161 (o)(2).

State Act was designed to protect these interests. It was conceived as an expression of the State's police power, "being necessary for the general welfare, the public health, and the public safety of the state and its inhabitants . . . "[5] It was also conceived as an expression of federalism, a willingness to enter into a joint venture with the national government for the abatement and control of oil-spill pollution, an enterprise shaped by Congress in the Federal Act, (which only provides for *Federal* action, for damages assessable for *Federal* costs, for massive *Federal-State* cooperation, and which specifically disavows preemption).

To conclude, as the District Court did, that a state cannot legislate in this area because the power of Congress to regulate maritime commerce is exclusive, is to rely heavily upon a non-sequitur. It is true that Congress alone may regulate maritime commerce. But it does not follow from this that the state is forbidden to exercise its police power to protect fundamental and compelling state interests. These points will be discussed below.

Through all of the flurry of legal argument invoking traditional concepts of Federal maritime policy, the Court is respectfully requested to measure the State Act by the end sought to be achieved: the right of a state to protect its property and that of its citizens. The property sought to be protected is, at least in one sense, necessary to life itself.

(1.)
The subject is water and the need to conserve it.

The possibilities of losing our water supply by depletion or pollution evoke fears almost as old as western civilization. To destroy sweet water is to threaten life. The effects of such a loss are so awesome that the power to accomplish it was ascribed early in our experience only to the deity who apportioned the power among a select few. So Moses threatened Pharoah:

[5] Ch. 70-244, Laws of Florida, 1970, § 21.

"Behold, I will smite with the rod that is in my hand upon the waters which are in the river, and they shall be turned. And the fish that are in the river shall die, and the river shall become foul . . . " Exodus 7:17-18.

But, 4000 years later, the "select few" have multiplied several million-fold, and today foul rivers and dead fish are commonplace. To appreciate the magnitude of the problem, it is necessary to understand the extent of our need for water.

In 1963, experts estimated that the maximum amount of fresh water available for all uses in the United States was approximately 650 billion gallons per day.[6] It was estimated that the total fresh water usage eight years ago was 360 billion gallons per day.[7] The projection for the year 2000 was 1000 billion gallons per day.[8] Since this is 350 billion gallons more than we have available, if the experts are within a 30% margin of error, we can better understand Pharoah's predicament.

Two feasible solutions have been suggested. One is to refine the process for making sea water potable,[9] and the other is to re-use our present water several times; to re-cycle water as we do aluminum, glass, and paper.[10] But in any case, it is necessary to safeguard the quality of even that water we intend to re-use. As Professor Hines observed in Part I of his Iowa Law Review trilogy on this general problem, 52 Iowa L. Rev. at p. 188:

Re-use of water requires that certain water quality levels be maintained, however, and here is where water pollution is a

[6]Report of the Staff of the Senate Committee on Public Works, 88th Cong., 1st Sess., A Study of Pollution—Water 3 (Comm. Print 1963), cited in Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality Part I: State Pollution Control Programs*, 52 Iowa L. Rev. 186 at 187, fn 2.

[7]Hines, p. 188, fn 3.

[8]*Id.*

[9]Carr, DEATH OF THE SWEET WATERS, 211-213 (1966).

[10]See, Bryan, *Water Supply and Pollution Control Aspects of Urbanization*, 30 Law & Contemp. Prob. 174 (1965).

critical obstacle to the assurance of adequate water supplies for the forseeable future. * * *

Two conclusions are reached from Professor Hines' trilogy and from a review of commentators he cites.[11] First, the water crisis will worsen, not abate, without strenuous efforts to conserve our present supply. Second, even with such strenuous efforts, developments in processes for re-cycling and for desalization are necessary if we are to survive as a civilization.

The public had only just awakened to the urgent necessity for conserving water resources when Moses smote the waters with his rod. In late March, 1967, the 60,000 gross ton oil tanker *Torrey Canyon* ran aground on Seven Stones Reef off the coast of Cornwall, England. The ship split open and discharged most of its crude oil cargo into the English Channel. Worldwide attention was focused on the efforts of two nations, Britain and France, to combat the massive slick. A multitude of procedures were employed, without success. Property damage particularly along the French coast was enormous. The damage to marine and animal life will never be accurately gauged. The R.A.F. finally bombed the wreck to destroy it, and the British exchequer alone was £1,600,000 lighter.[12]

The *Torrey Canyon* was American owned and Liberian registered. Therefore, the Board of Investigation of Liberia held an official inquiry April 3-5, 1967, to determine the cause of the stranding of the vessel. The Board found the sole cause to have been negligence of the captain. It recommended that his license be revoked.[13]

[11] F. Graham, DISASTER BY DEFAULT: POLITICS AND WATER POLLUTION (1966); Wright, THE COMING WATER FAMINE (1966); Rodale, OUR POISONED EARTH AND SKY (1964); Carson, THE SILENT SPRING (1962); Stein, *Problems and Progress in Water Pollution* 2 Natural Resources J. 388 (1962).

[12] See, Comments, *Oil Pollution of the Sea*, 10 Harv. Inter. L. J. 316 (1969), hereinafter cited as "Comments."

[13] Comments, p. 331, fn 69.

The owners of the *Torrey Canyon*, as authorized by the Limited Liability Act of 1851, Ch. 43, § 3; 9 Stat. 635, 46 U.S.C. § 183 (1964), were permitted to file a petition to limit their liability to $50, the value of one surviving lifeboat.[14] This order was subsequently modified, 409 F. 2d 1013 (2d Cir. 1969), but only by virtue of ingenious legal tactics by attorneys for the governments of Great Britain, France, and the States of Guernsey to avoid absurd limitations of maritime law.[15]

(2.)

The subject is also preservation of other resources and the state's right and duty to protect them from oil pollution.

The problem with a massive oil slick is that its ultimate effects are not always ascertainable before legal action must be taken, and even when they are, there's not very much that victims can do to obtain compensable damages for their loss.

More than 880,000 barrels of oil were aboard the *Torrey Canyon*, and more than half of it was estimated to have been released into the sea.[16] Britain figured its cost of clean-up at $8,156,400. France sought an additional $8 million for removing oil from its coasts. To off-set these clean-up costs, the tanker's owners settled out of court with the British and French governments for $7.2 million.[17] Assuming that the Federal Act had been in effect and had controlled the outcome of liability arising out of the *Torrey Canyon* episode, claimants would have received 1.2 million dollars less! At $100 per gross ton, a 60,000 gross ton tanker has a liability limit of $6 million. Even though the clean-up costs exceeded $16 million, the $14,000,000 ceiling in the Federal Act would never have been reached. See Notes, *Liability for Oil Pollution*

[14] In re Barracuda Tanker Corp., 281 F. Supp. 228 (S.D.N.Y. 1968).

[15] For the legal landscape prior to 1948, See Nanda, *The Torrey Canyon Disaster: Some Legal Aspects*, 44 Denver L. J.

[16] Comment, *Post Torrey Canyon: Toward a New Solution for the Problem of Traumatic Oil Spillage*, 2 Conn. L. Rev. 632 (1970).

[17] E. Cowan, OIL AND WATER: THE TORREY CANYON DISASTER (1968).

Cleanup and the Water Quality Improvement Act of 1970, 55 Cornell Law Review 973 (1970), where at fn 78, p. 982, is the following comment relative to the $100 per gross ton limitation in the Federal Act:

> "Using the Torrey Canyon figures (59,000 tons of oil cleaned up at a cost of $16 million), it costs about $270 to clean up one ton of oil. Since the ratio of deadweight tonnage (cargo capacity) to gross tonnage on the Torrey Canyon was about two to one . . . the cleanup costs were approximately $540 per gross ton.
>
> "The $100 per gross ton limit is inadequate even if one assumes, as did the American Petroleum Institute (1969 Hearings, pt. 4, 1318), the cost of cleanup following the Torrey Canyon wreck to be $7.2 million. Using that figure, the costs come to $244 per gross ton.
>
> "A study conducted by the Federal Water Pollution Control Administration also indicates the insufficiency of the $100 per gross ton figure. It was found that cleanup costs range from under $1.00 to over $5.00 per gallon of oil. There may be from 240 to 300 gallons of oil in one ton, depending upon specific gravity and temperature. Finally, the ratio of carrying capacity to gross tonnage varies from 2.7:1 to 1.5:1. Using figures of $1.00 per gallon, 250 gallons per ton, and a ratio of 1.8:1, cleanup cost was calculated to be $450 per gross ton.
>
> "Although gross tonnage has traditionally been used to calculate liability, it is more meaningful to speak in terms of dead weight tonnage. The latter is the cargo carrying capacity of the vessel, and the ratio between the two varies from vessel to vessel. Thus, although a liability figure based on gross tonnage would accurately reflect cleanup costs of the oil carried on one vessel, it might be very inaccurate when applied to another vessel. The amount of oil, not the vessel's gross tonnage, determines the cleanup costs. * * *"

If one estimates cleanup costs to be $270 per ton on an average, the $14 million ceiling on negligence liability under the Federal Act will limit recovery to spills somewhat under

the *Torrey Canyon* class; it has been estimated by the same commentator quoted above that this limitation will pay costs of cleanup of only 51,851 tons of oil.[18]

The *Torrey Canyon*, of course, at 118,000 dead weight tons, was not the largest tanker afloat by any means. The tankers *E. Maersk* (100,600 dwt), *Bergebig* (149,500 dwt), *Esso Scotia* (250,000 dwt), *Universe Island* and *Universe Kuewait* (each at 312,000 dwt) are already in use.[19] But even these larger vessels are not enough. The increase in shipment of oil by sea demands bigger bottoms. As is noted at 10 Harvard International Law Journal at page 317:

"* * * (B)etween 1938 and 1967 world production of oil increased nearly seven times, from 278 million tons per year to 1,828 million tons. In 1967, it was estimated that more than 700 million tons of this annual production were being transported by sea.

"Not only is more oil being moved by sea each year, but the size of oil tankers has also increased. The average tanker used during World War II had a capacity of 16,000 tons, but by 1965 that average had risen to 27,000 tons, and new tankers delivered in 1966 average about 76,000 tons. A Japanese company has launched a 276,000 ton tanker, and other Japanese yards have orders for tankers as large as 312,000 tons. More than sixty tankers of 150,000 tons or more are on order throughout the world, tankers of 500,000 to 800,000 tons are on the drawing boards, and those of more than one million tons are thought to be feasible. On the new 1,010 foot British tanker "Esso Mercia" two officers have been issued bicycles to help patrol the decks of the 166,890 ton vessel.

"The size of the tanker fleet itself is growing at a rate that rivals the growth in average size of new tankers. In 1955 the world tanker fleet numbered about 2,500 vessels. By 1965 it had increased to 3,500, and in 1968 it

[18] 55 Cornell Law Review 973 at 982, fn 79.
[19] 55 Cornell Law Review 973 at p. 983, fn. 80.

numbered some 4,300 ships. At the present time nearly one ship out of every five in the world merchant fleet is engaged in transporting oil, and nearly the entire fleet is powered by oil.

If the present limitations upon liability of ship owners are to continue, limiting the owners' liability to the value of the vessel *after* the accident, and assuming no problems vis-à-vis knowledge or privity on the part of the owners, it is not at all inconceivable that an 800,000 dwt. ton super-tanker could dump more than 3/4 of a million tons of crude oil between the coast of Florida and the Gulf Stream, break up and sink, and leave the owners completely free of liability for damages to the environment, to private property, and to businesses depending upon tourism.[20] Assuming that the Federal Act were applicable, at a cleanup cost of $270 per ton, the owners liability would be limited to damage caused by less than 52,000 tons out of the 750,000 tons spilled.

But even this is not certain under the Federal Act. For under 33 U.S.C. § 1161 (b)(2) it is not a violation to discharge oil into or upon waters of the contiguous zone where such discharge is permitted by article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended.[21] Excepted discharges under the Convention include those to save life at sea, discharges resulting from damage to a ship, and jettison discharges to safety of ship and cargo. Patently, catastrophic oil-spills of the *Torrey Canyon* category occur for reason of colision or stranding. It is difficult to imagine either without "damage to the ship". Thus, assuming Seven Stones Reef to have been between three and 12 miles off-shore, the Federal Act, had it governed recovery, would have availed the government nothing.

[20]See, Shutler, *Pollution of the Sea By Oil*, 7 Houston L. Rev. 415 at p. 438 (1970).

[21]1954 London International Convention for the Prevention of Pollution of the Sea by Oil, as amended Apr. 11, 1962, annex A, (1966) 17 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332.

Damages to business and to private property in such a hypothetical catastrophe are almost limitless. It is not difficult to understand the effect this would have on tourism and the state's economy, nor the rage and frustration of private citizens whose right to enjoy the environment or, indeed, their homes would be thereby diminished or destroyed.

But what of the damages to the ecology? To what extent is such a tragedy an overdraft upon the bank in which is stored this generation's apportioned amount of our natural resources?

"Some damage to marine life is obvious in the wake of a disaster such as the one which befell the 'Torrey Canyon'. Surface feeding fishes die when they swim into floating oil, and even slight, non-fatal contact may render the fish inedible. Shellfish, among others, are also vulnerable to oil pollution. When the tanker 'P.W. Thirtle' grounded off Newport, Rhode Island, 31,000 gallons of heavy, black oil were discharged from her tanks in an effort to refloat the ship; the result of this was the virtual destruction of the entire oyster fishery of Narragansett Bay. The most serious consequences of oil pollution, however, may not be those which are immediately obvious. According to Dr. Erwin S. Iversen, a marine biologist:

> The greatest problem may be the toxic effects on the intertidal animals that serve as food for the other more important fishes . . . I don't think the effect is merely that of killing large populations of commercial fishes. Worse than that, it interrupts the so-called food chain.

"There have been few specific studies of the effect that oil accumulation has on this food chain. One study, conducted by Dr. Paul Caltsoff of the United States Fish and Wildlife Service, found that the diatoms on which oysters feed will not grow where there is even a slight trace of oil on the water. The effect of oil on such microscopic marine plant life may be of great importance, because it is estimated that it takes as much as ten pounds of plant matter to produce one pound of fish.

"Large scale oil pollution, such as that which occurred when the "Torrey Canyon" ran into Seven Stones Reef, results in hugh lossess of water birds. Aside from humane and aesthetic considerations, these birds play a vital role in the ecology of the seashore, a role which profoundly affects the fishing industry. The uncertainty as to the actual extent of the damage done to marine life by oil pollution makes it difficult to estimate the economic effect of such damage, but the importance of the fishing industry within the world's economy is not in doubt and is steadily increasing. Between 1958 and 1963, for example, there was a 42% rise in the world catch. Because of the increasing importance of seafood protein, future damages to marine life will have progressively greater economic consequences.[22]

All legislation is prospective, and it is necessary in preparing legislation to think in terms of hypotheticals. But it is not improbable that Florida would suffer a catastrophic oil-spill of the dimensions theorized above. Far from it. The "it-can't happen-here" assurances should have been drowned in the estimated 21,000 gallons of Bunker "C" oil[23] that flowed from the ruptured hull of the tanker *Delian Apollon* which ran aground just south of Gandy Bridge in Tampa Bay on February 13, 1970. The oil slick several days later covered 100 square miles of Tampa Bay,[24] and cost Humble Oil & Refining Company approximately $1.4 million to clean up, a settlement out of court of the suit brought by the State of Florida.[25]

It is against this background that the Florida legislature convened in 1970, and passed the State Act. The legislature was aware of the frustrations and trials met by the Senate Committee attempting to shape realistic and responsible

[22] 10 Harvard International Law J. 316 at p. 321 (1970).
[23] *St. Petersburg Independent*, February 18, 1970, p. 1.
[24] *Tampa Tribune*, February 16, 1970, p. 1.
[25] *Earl Faircloth v. Motor Tanker Delian Apollon*, USDC, M.D., Tampa Division, No. 70-47-Civ-T, February 16, 1971.

legislation on the Federal level.[26] The legislature was also aware that the Federal Act, which became law during the first week of the 1970 session, expressly sanctioned the right of the states to enact legislation in the field of marine oil-spill pollution. Moreover, Florida lawmakers were aquainted with shortcomings in the Federal Act, such as the limitation of negligence liability, and its limited effectiveness to oil pollution only. The State Act attempts to fill gaps in the Federal Act; it takes up where the Federal Act leaves off.

B. The District Court's Error

> *"Oil is oil and whether useable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation and a pollutant."*[27]

> *"Pollution by oil is no longer accepted as a necessary, if unfortunate, by-product of oil use in furnishing the energy needs of the United States. Damage from oil pollution has become a major part of the public concern with the deterioration of our environment."*[28]

> *"One of the most effective ways to control oil discharge would be to force the oil companies to bear all the risks attendant to oil shipping. If this were possible, many of the problems involved in oil transport by sea would be greatly diminished since oil companies and their insurers would have financial incentive to take every precaution against potential damage."*[29]

[26]Problems faced by the Congress in attempting to reach a reasonable result in the Federal Act are well documented in Mendelsohn, *Maritime Liability for Oil Pollution—Domestic and International Law*, 38 George Washington L. Rev. 1 (1969).

[27]Mr. Justice Douglas in *United States v. Standard Oil Co.*, 384 U.S. 224 at 226 (1966).

[28]*Legal, Economic, and Technical Aspects of Liability and Financial Responsibility as Related to Oil Pollution*, A Study by the Program of Policy Studies in Science and Technology, George Washington University, For the United States Coast Guard, (December 1970) at page i.

[29]Baldwin, *Public Policy on Oil—An Ecological Perspective*, 1 Ecology Law Quarterly 245, 271 (Spring 1971).

Absolute liability without fault is the *sine qua non* of protection against oil-spills and the corner-stone of objections to the Florida Act.

(1.)

"That the Florida Act constituted unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. The most obvious changes would be in the liability now imposed by W.Q.I.A. and maritime rules on shippers and the operators of onshore and offshore facilities.... Under the Florida Act ... liability without fault is the foundation for 'damage incurred by the state and for damage resulting from injury to others,' just as it is in the case of cleanup costs. By substituting absolute liability for proof of negligence or unseaworthiness as a condition to unlimited recovery, the Florida Act, if valid, would materially change the substantive maritime law governing the disposition of claims arising from the pollution of coastal waters." *The American Waterways Operators, Inc. v. Reubin O'D. Askew, et.al.*, 335 F. Supp. 1241 (M.D. Fla. 1971), (A 42-43)

The Florida Act deals with sea-to-shore torts. Its principle thrust is toward their prevention and control. It is concerned not for welfare of shipping interests, but for welfare of its citizens. It is designed not to protect traditional concepts of maritime law, but the property of persons having no connection with the admiralty. Interests protected by the State Act are not *in privity* with maritime commerce through contracts, employment, freight, cargo, industry or profits.

This is not to say that Florida has no citizens, corporate or private, engaged in or dependent upon shipping. It is, rather, to admit the obvious: that such business interests are incidental to the dominant state interests protected by the the legislation whose judicially imposed demise is appealed here.

The Florida Act imposes unlimited liability without fault upon virtually any vessel which discharges oil or any other pollutants while destined for or leaving any Florida port. § 376.12, Florida Statutes; (A 68); § 376.031(7), Florida Statutes, (A 58). It does so to complete the protection of interests described. Anything short of unlimited liability without fault is less than complete protection. This premise, upon which the Florida Act is based, is strenuously resisted by maritime interests. The intensity of their resistence attests to validity of the premise.

The Florida Act does not deal with minor spills and discharges. These occur daily in state waters. Damage recovery from such spills to state waters, the ecology, and shoreline cleanup is provided under a companion statute.[30] Damage incurred by private property owners, relatively minor, is remedial in common-law courts. It is doubtful that such would be frustrated by limitation proceedings under 46 U.S.C. § 183 (1964).

Although damages from minor spills are recoverable under the State Act *sub judice*, the Act's focus is not so limited. The State of Florida does not appeal here from loss of duplicate remedies. The State's concern is more urgent. It goes to the heart of the statutory scheme described above.

The Florida Act is addressed to effects of a maritime disaster of *Torrey Canyon* proportions.[31] Without unlimited and absolute liability imposed by statute against owners or charterers of the offending tanker, no remedy exists for state

[30]Chapter 403, Florida Statutes, Part I, The Florida Air and Water Pollution Control Act of 1967, as amended; Part II, Interstate Environmental Control Compact of 1971.

[31]For descriptions of this occurrence and insight into its appropriateness in the instant context, see Mendelsohn, *Maritime Liability for Oil Pollution—Domestic and International Law*, 38 George Washington L. Rev. 1 (Oct. 1969); Comment, *Oil Pollution of the Sea*, 10 Harv. Inter. L.J. 316 (1969); Nanda, *The Torrey Canyon Disaster: Some Legal Aspects*, 44 Denver L.J. 400 (1967); E. Cowan, OIL AND WATER, THE TORREY CANYON DISASTER (1968).

or private property owners damaged by a massive oil slick.[32] Under Federal maritime law as conceived by the District Court in this case, owners and charterers would find safe harbor in admiralty defenses and limitations, while Florida beaches, marinas, and waterways were smeared with 440,000 barrels of crude oil. Assuming that such an occurrence cost the State of Florida no more than it cost the governments of Great Britain, France, and the Guernsey Isles to cleanup approximately the same size slick, the 'bottom line' would still amount to far more than merely $16,000,000. Aside from the adverse ecological effects, what would it cost private hotel owners who depend upon a pollution-free environment to meet mortgage payments? What would it cost peripheral businesses such as airlines, buses, taxi and rental car companies? What would it mean to restaurant and night-club business in the area affected? How much would it lessen employment? Florida leases territorial sea-beds for aquaculture projects on the premise that man will one day live off of food from the sea as he does now from conventional farms.[33] If 31,000 gallons of oil discharged off the coast of Rhode Island by the grounded tanker *P.W. Thirtle* could virtually destroy the entire oyster fishing industry on Narragansett Bay, what would a 440,000 barrel slick do to aquafarming or Florida's commercial fishing industry, or the commercial oyster beds in Apalachicola Bay? Why should all of the interests, public and private, adversely affected by a massive oil-spill be subject to frustrations of the Limitation of Liability Act, 46 U.S.C. § 183?[34] The practical effect in this context of limitation

[32]Approximately half of the *Torrey Canyon's* 880,000 barrels of crude oil are estimated to have spilled into the English Channel to form the largest oil slick in history. Comment, *Post Torrey Canyon: Toward a New Solution to the Problem of Traumatic Oil Spillage,* 2 Conn.L.Rev. 632 (1970); Note, *Liability for Oil Pollution Cleanup and the Water Quality Improvement Act of 1970,* 55 Cornell L. Rev. 975, 982 (1970). Compare this with the 100-square mile slick formed in Tampa Bay by *Delian Apollon* when only 21,000 gallons of oil escaped. Cleanup costs for *Torrey Canyon* slick were in excess in $16 million; for the *Delian Apollon* a mere $1.4 million.

[33]253.67 - 253.75, Florida Statutes.

[34]See how it worked with *Torrey Canyon: In re Barracuda Tanker,* 281 F.Supp. 228 (S.D.N.Y. 1968), modified 409 F.2d 1013 (2d Cir. 1969).

proceedings is to deny those damaged any remedy for wrong done them. That is the result of application of maritime law. And that is the reason for unlimited and absolute liability in the Florida Act.

The State Act subjects owners of vessels and terminal facilities to two principal conditions:

First, under § 376.12 anyone who "permits or suffers" a polluting discharge is absolutely liable (a) to the state "for costs of cleanup or other damage" and (b) for damages resulting from injury to others. (A70) The state must prove only the fact of the occurrence of the polluting discharge. It need not plead or prove negligence. The fact that liability is unlimited makes it no different from any other form of tort liability, including the liability for negligent pollution damages which existed prior to this statute. It is the absolute character of the liability that is unusual.

Second, § 376.14 requires owners or operators of terminal facilities or vessels to maintain with the Department of Natural Resources "evidence of financial responsibility based on the capacity of the terminal facility or tonnage of the ship, the cargo carried, and other similar factors to which the vessel could be subjected * * * " (A70)

It is important for purposes of analysis to keep in mind the distinction between the ***absolute liability*** provision and the *financial responsibility* requirement. This distinction is underscored by the history of response to the statute. The statute became effective July 1, 1970. However, the requirement of filing under the financial responsibility provision was postponed to March 15, 1971. Maritime interests took no action to oppose the law until shortly before the financial responsibility filing date; that, and not the passage of the law, triggered the opposition.

In the District Court, maritime interests made no attempt to differentiate between the issues of absolute liability and financial responsibility. Rather, they maintained generally that they could not comply with the law without ruinous

consequences, using their arguments on each issue to buttress the other. (See paragraphs 25-29, Complaint, A 10-12)

As to absolute liability, maritime interests maintain that they could not continue to do business while exposed to *unlimited* liability under the Act. They pointed out that they could not insure against such liability.

The unlimited liability to which maritime interests were subjected is no ground for reasonable objection. Under common law they were subject to unlimited liability for any kind of tortious action, just as an individual motorist is subject to unlimited liability for negligence. Limitation proceedings under 46 U.S.C. § 183, although theoretically available, would not always be desirable. The strict liability provision of the Act of course gives them greater exposure, but businessmen are able to operate subject to strict liability in other commercial areas.

Although the State Statute purports to eliminate negligence as an element of liability, the person made liable under § 376.12 is one "who permits or suffers" a polluting condition. (A 68) This language clearly indicates that the fact of pollution is not enough; some element of responsibility must be established as a requisite to recovery.

Moreover, § 376.11(6) provides that the Department of Natural Resources shall recover for the "coastal protection fund" established under this section "from the person or persons *causing* the discharge jointly and severally all sums expended therefrom . . . " (Emphasis supplied; A 67) Again, wording of the statute reiterates the requirement of establishing responsibility as a necessary condition to recovery.

It is in the insurance aspect that the maritime interests make their most effective argument, but they do so by confusing the strict liability and financial responsibility requirements. As discussed more fully below, *rules promulgated* under the State Act (as opposed to language of the Act itself) require that an insurance policy sufficient to meet financial responsibility requirements must have no limits on the

amount of coverage. (A 73) No insurance company would prudently issue such a policy.

However, there would seem to be no valid reason why maritime interests could not obtain insurance having *a specific limit* of liability. Such a policy, although it would not meet the financial responsibility requirement of the present rules, would offer protection to the insured. Protection afforded by such a policy would be tantamount to the protection enjoyed by a motorist who has a liability policy of stated limits and who must bear the exposure of liability above the policy limits.

Maritime interests, however, ignored this possibility, and emphasized that the financial responsibility *rule* requires an unlimited policy which cannot be obtained, and by this confusion made an appealing argument that they could not insure against the liability imposed by the Act.[35]

Insurance companies have apparently indicated other objections to providing coverage under the Act, such as the provision which allows direct suit against the insurer.[36] However, only the requirement in the Regulations (A 73-74) of insurance against unlimited liability appears to support objections against providing coverage.

Financial responsibility under the state Act (A 70) may be established by one or more of the following:

1. Evidence of insurance;
2. Surety bonds "conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any other person;"
3. Qualification as a self-insurer;

[35]See letter from American Institute of Merchant Shipping to Capt. W. C. Dahlgren, U.S.C.G., published in *Legal Economic, and Technical Aspects of Liability and Financial Responsibility as Related to Oil Pollution*, A Study By the Program of Policy Studies in Science and Technology, George Washington University, For the United States Coast Guard (Dec. 1970) at pages 4-445 - 449.

[36]*Id.* at pages 4-2 and 4-3.

4. Other evidence of financial responsibility satisfactory to the Department.

It should be noted that under the statutory wording only the surety bond provision expressly requires unlimited liability; the insurance provision does not.

In practice, the financial responsibility requirement has been supplemented in three ways, two of which make compliance easier, and one of which makes compliance more difficult.

(1) Rules issued by the Department of Natural Resources, State of Florida, (A 74) require that a showing of financial responsibility need be established only in "an amount not to exceed" $100 per gross ton of a company's largest vessel or $5 million, whichever is lower; and

(2) Under the "other evidence" method of financial responsibility the Department accepts certified financial statements which show financial responsibility sufficient to meet the foregoing standard of $100 per ton up to $5 million (Transcript of Testimony, Hearing on Application for Temporary Restraining Order. pp. 237-238); but

(3) Despite the foregoing $100 per gross ton or $5 million limitation, the rules require that proof of financial responsibility by "evidence of insurance" must be by a policy of unlimited liability, "conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any other person." This provision was apparently put in the rules as a copy of the surety bond provision. As has been noted, no insurance company will write a policy for unlimited liability. The effect of this rule, therefore, is to eliminate insurance as a method of qualifying under the financial responsibility provisions of the Act. But it does not follow from this that the statutory requirement of evidencing financial responsibility is consequently unconstitutional or impossible to comply with.

The maritime interests have, as a matter of fact, demonstrated the practicality of the "other evidence" method of qualifying. As of the time of the TRO hearing, 28 applications for certification had been approved covering a total of 669 ships, 438 of U.S. registry and 231 foreign (Transcript of Testimony, Hearing on Application for Temporary Restraining Order, pp. 234-235).

Nevertheless, maritime interests argue that they cannot qualify on their financials because to do so would be to subject themselves to unlimited and uninsured liability. This, of course, is a non-sequitur and completely invalid.

Maritime interests may have a legitimate objection to the rule for qualification by insurance, since it requires a policy without limits. But this objection goes to the reasonableness of that condition as predicate for financial responsibility certification, and *has nothing to do with the scope of their liability*. In no event can the possible unreasonableness of a prerequisite to one of several methods for satisfying financial responsibility published in a Department of Natural Resources Regulation sustain a practical argument against unlimited and absolute liability.

During congressional hearings which led ultimately to passage of the Federal Act, absolute liability was considered by many to be necessary. It was attacked by maritime interests on grounds that absolute liability was *inequitable*. Examples were cited describing such inequity. Through no fault of a shipowner, a vessel might strike a mine, or be "overwhelmed" by a hurricane or subject to some other natural calamity at sea.[37]

This argument raises two comments: first, it only contemplates a small part of the tragedy, only that segment occurring at sea. It implies an innocent owner or charterer sending an innocent vessel on innocent passage through innocent sea;

[37]Hearings on HR 6495, HR 6609, HR 6794, and HR 7325 *Before the House Committee on Merchant Marine and Fisheries*, 91st Cong., 1st Sess. 261-69 (1969).

suddenly a victim of violent, unforeseen forces that break open the vessel, threaten lives of passengers and crew, and cost the owner a lot of money. It misses the rest of the picture.

It fails to consider the fact that the owner is probably a heavily insured corporation deriving most of its profits from leasing bottoms to charterers, most of whom would be oil companies who would not have sent the vessel loaded with crude oil through the hurricane latitudes were it not necessary in order to maintain and operate a highly profitable business enterprise. It fails to consider the fact that the vessel, cargo, and freight, in all probability, are insured. Mostly, it fails to consider the nature of the cargo. Crude oil pollution of property ashore and territorial waters of nearby states should also be contemplated. Adverse effects of ecological and economic damage inflicted on equally innocent, non-maritime property owners are ignored completely.

Secondly, implications of the resistance to absolute liability in arguments before the House Committee describe an anachronistic concept of tort liability: that because the owner of a vessel is blameless of the hurricane, he should be absolved of blame for the loss suffered and therefore immune to damages compensating for that loss.

> * * * A modern tort-law commentator would have responded that the question today is not one of fault or blame but rather who is in the best position to bear the losses or distribute the risk. Should it be the adjacent shore owner who had absolutely no relationship to the vessel or its cargo, indeed, did not even know of its existence until the oil spilled on his beach, or [should it be] the government paying for clean-up costs out of the public treasury? Or should it be the vessel-owner, together with the cargo-owner, who profit from the carriage contract, appreciate the full risks that are involved, and are in the optimum position to bear the losses or distribute those risks through self, mutual or other forms of insurance?[38]

[38]Mendelsohn, *Maritime Liability for Oil Pollution*, 38 George Washington Law Review 1, (October 1969), at pages 14-15.

It is submitted that absolute liability is required by the circumstances. A massive oil-spill in its territorial waters is no less dangerous to the health and welfare of a state than a major conflagration, hurricane, or other natural disaster would be.[39] Moreover, liability must be measured by damage proven. To limit claims by an arbitrary and unrelated yardstick, such as tonnage of the vessel or value of the wreck, is utterly without foundation in reason, fairness or justice. In providing unlimited liability without fault, the Florida Act seeks to protect fundamental state interests. It is a valid exercise of the police power. *Crowell v. Benson*, 285 U.S. 22 (1932; *Chicago R.I. & P.R. Co. v. Eaton*, 183 U.S. 588 (1901); *Sherlock v. Alling*, 93 U.S. 99 (1876); *The China v. Walsh*, 74 U.S. (7 Wall) 67 (1868).

Reasons for the exercise have been described. Authority for the exercise and why it is not an unconstitutional conflict with Federal prerogatives is discussed below.

C. Police Power is Power to Protect.

"It may be said in a general way that the police power extends to all the great public needs."[40]

"The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire."[41]

"Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional applications of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . ."[42]

[39]Shutler, *Pollution of the Sea by Oil*, 7 Houston Law Review 415, 418-419 (March 1970).

[40]Mr. Justice Holmes in *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

[41]Mr. Justice Gray in *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U.S. 1, 26 (1896).

[42]Mr. Justice Douglas in *Berman v. Parker*, 348 U.S. 26, (1954).

(1.)

If the State cannot secure a remedy when its citizens have been wronged then the police power of the State is little more than an academic curiosity.

If the state is powerless to protect its citizens and its environment from the ravages of oil-spill pollution caused by ships calling at its ports, or by corporate entities chartered by it, or by businesses licensed by it, then it fails to meet one of the essentials of good government, for it has failed in its duty to protect property.

The argument of maritime interests, reduced to its last analysis, is this: the terminal companies and maritime interests may lawfully use, store, and transfer pollutants, and as they are pursuing a lawful business, they are only liable for negligence in its operation; and when in a given case they can demonstrate they are guilty of no negligence, then they cannot be made liable.

To this the citizen answers: 'I also own my property lawfully and have a lawful right to enjoy the environment of the State. I did not do anything to bring about the spill of pollutants into state waters. You say you are guiltless of negligence. Yet the waters are polluted and the air is fouled as a result of a discharge from the operation of your agency, albeit careful and cautious and prudent. And I am denied redress even though I have done nothing to in anyway bring about such a discharge.' (Paraphrased from *Campbell v. Missouri P.R. Co.*, 121 Mo. 340, 25 S.W. 936, 25 L.R.A. 175 (1894); quoted with approval in *St. Louis & San Francisco R. Co. v. Mathews*, 165 U.S. 1 (1896). Neither case involved water pollution, but the rationale of both cases is analogous to the instant controversy.)

It may be that prior to the State Act, shippers and terminal owners were only liable for negligence in an occurrence causing water pollution, and that, where this criterion of tort liability could not be proven, the citizen was without redress.

But it does not follow from this that the legislature is, therefore, powerless to ever enact legislation granting needed protection to its citizens in the form of absolute liability for the damages proven as a result of their acts. That is what the legislature has done. It has made those who traffic in pollutants responsible for damage to property and to the environment caused by those pollutants upon discharge into the waters of the state. It is perfectly competent for the state to do so. To deny this is to stand for the proposition that the ultimate burden for oil-spill pollution is properly that of the private citizen and not those whose instrumentality caused the discharge. That it may have been so in the past does not mean that it must continue to be so in the present or for the future.

The police power of the state is peculiarly appropriate to the object sought to be achieved by the State Act. While this is a case of first impression before this Court, state statutes purporting to impose absolute liability upon railroad corporations for all property lost through fires caused by sparks emitted from locomotive engines have been upheld against constitutional attack. St. Louis & San Francisco Ry. Co. v. Mathews, *supra*; II Cooley *Constitutional Limitations* (8th ed.) Ch. XVI, p. 1244. The words of Mr. Justice Gray in the above cited case, 165 U.S. at p. 26, are applicable:

> * * * It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of

> dangerous instruments should rest upon the railroad company which employs the instruments and creates the peril for its own profit rather than upon the owner of the property, who has no control over or interest in those instruments .... The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making a party doing a lawful act for its own profit liable in damages to the innocent party injured thereby, and giving to that party the whole damages measured by the injury suffered. (citations omitted)

To argue that the police power of the State does not reach as far as Florida's position requires is to overlook the breadth of the police power itself. In *Berman v. Parker* 348 U.S. 26 (1954), Mr. Justice Douglas described the breadth of the police power in terms which would surely encompass circumstances in which the State Act was passed.

To suggest that the State cannot control such pollution because it is beyond the scope of the police power, is to overlook further the landmark case of *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). In this case, a corporation engaged in operating Federal licensed steam vessels in interstate commerce sought to enjoin enforcement of the city's Smoke Abatement Code. Under the Code, the corporation's steam vessels could not perform necessary cleaning of their boilers within the city without undergoing structural alteration. This Court upheld the ordinance and ruled that the Code could constitutionally be applied to the corporation's ships rejecting the argument that Federal statutes relating to inspection, approval, and licensing of steam vessels in interstate commerce preempted the area, and that the Code was an unconstitutional burden on interstate commerce. Said Mr. Justice Stewart for the seven-man majority at 362 U.S. 442:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that

people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. * * * (Citations omitted).

"* * * Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action * * * (Citations omitted).

"In determining whether state regulations has been pre-empted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' Savage v. Jones, 225 U.S. 501, 533, 56 L ed 1182, 1195, 32 S Ct. 715."

It is clear from the *Huron Portland Cement* case that an attack on the State Act based upon a violation of Art. I, § 8 of the Constitution must fail, for the mere fact that a State statute imposes a burden on commerce is not enough. There must be more. There must be a conflict with the Federal scheme of things. It is the imposition of the inconsistent duties or obligations making dual compliance impossible which is prohibited. See, also *Cooley v. Board of Port Wardens*, 12 How. 299 (1851) which teaches that states under their police power can adopt regulations in matters of local concern even though, in some measure, they affect and regulate interstate and maritime commerce.

Thus it is not merely a question of whether Congress has acted in a given field that determines whether states are preempted from exercising their reserved powers. The congressional act must specifically exclude state legislation, and it must do so on clear constitutional authority. Kelly v.

Washington, 302 U.S. 1 (1937), reviews the cases, and ovserves at page 14:

> When the State is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the State to exclude diseased persons, animals and plants. These are not proper subjects of commerce. When the State is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the State of the power which it would otherwise possess. And we are unable to conclude that so far as concerns the inspection of the hull and machinery of these vessels of respondents in order to insure safety and seaworthiness, the Federal laws and regulations, which as we have found are not expressly applicable, carry any implied prohibition of state action.

It should be noted at this juncture—although it will be discussed in detail below—that the Federal Act does reach wrongs with which the State Act is concerned. But it can hardly be said to foreclose state legislation. In the first place, the Federal Act *provides no remedies to other than Federal agencies*, and, in the second place, it expressly disclaims any trace of preemption. Thus, it can hardly be maintained that Congress has precluded the exercise of state police power in the area of oil-spill pollution of territorial waters.

Nor should it be maintained that, in the absence of congressional action in specific areas reached by the State Act, necessity of uniformity of regulation is imposed by Article III, Section 2, United States Constitution, merely because the nature of the concern is maritime. The nature of the concern was maritime in Cooley v. Board of Port Wardens, *supra; Ex parte McNeil*, 13 Wall. 236 (1872); *Gilman v. Philadelphia*, 3 Wall. 713 (1866); *Mobile County v. Kimball*, 102 U.S. 691 (1881); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1882); *Escanaba & L.M. Transp. Co. v. Chicago*, 107 U.S. 678 (1883); *Parkersbury & Ohio River Transp. Co.*

v. Parkersburg, 107 U.S. 691 (1883); *Morgan's L. & T.R. & S.S. Co. v. Board of Health*, 118 U.S. 445 (1886); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Lawton v. Steele*, 152 U.S. 133 (1893); *Lee v. New Jersey*, 207 U.S. 67 (1907); *Port Richmond & B.P. Ferry Co., v. Hudson County*, 234 U.S. 317 (1914); *Wilmington Transp. Co. v. Railroad Commission*, 236 U.S. 151 (1915); Kelly v. Washington, *supra; Skiriotes v. Florida*, 313 U.S. 69 (1940); *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943); and Huron Portland Cement Co. v. City of Detroit, *supra*. In each case the Court was confronted with a local regulation or enactment affecting maritime commerce or asserted to be exclusively within admiralty and in each case the local regulation was sustained as an appropriate exercise of the police power. *Cf. Clyde Mallory Lines v. State of Alabama*, 296 U.S. 261 (1935).

Requiring vessel owners and operators to maintain financial responsibility is certainly permissible within the police power. It is a means—the only means—of enforcing that which might otherwise be unenforceable.

In like effect, requiring any vessel transporting pollutants in state waters to be equipped with specific containment gear and a crew trained in its use is necessary not only for safety of the port, but also to facilitate commerce by keeping navigation open for vessels entering and leaving the port. For safety-sake, a vessel can be refused entry altogether or allowed to enter under conditions prescribed for safety of the port. There is no conflict with maritime law merely because the regulations are set out in a statute. To require containment gear and a trained crew is not an unreasonable regulation of maritime commerce, anymore than certain requirements imposed by states upon trains, buses, trucks or aircraft represent an unreasonable burden on interstate commerce, i.e. *Maurer v. Hamilton*, 309 U.S. 598 (1939); *South Carolina v. Barnwell Bros.* 303 U.S. 177 (1937); *Southern P. Co. v. Arizona*, 325 U.S. 761 (1932); *Sproles v. Binford*, 286 U.S. 374 (1931).

To require minimum sea conditions and a sound ship as requisite to entry and unloading operations is also reasonable for protection of the port.

The Florida Act subjects vessels to inspection by a port manager to determine presence of the required containment gear and seaworthiness of the ship. This is not new to maritime law, nor is it unreasonable; particularly when an oil-spill has been legislatively determined to be of sufficient threat to the health, welfare, and public safety to warrant an exercise of the police power. To require containment gear and not be able to ascertain its presence is to create an unenforceable requirement. That necessary gear to contain a spill was *not* present in a given instance would be unascertainable until the oil-spill occurred; and then it would be too late. If the requirement of containment gear is valid at all, police power would substantiate enforcement. Enforcement measures cannot effectively omit boarding and inspection. See Kelly v. Washington, *supra*; Morgan's L. & T. Railroad and Steam Ship Co. v. Louisianna Board of Health, *supra*. To the extent that such measures are an imposition upon maritime commerce, then maritime commerce must learn to accomodate them–as it has in the past.

Mechanics of the Florida Act are not new to this Court. In one form or another, they have met with judicial approbation before. They have been sanctioned precisely because they are reasonable means to accomplish the end sought to be achieved. Effective exercise of the police power would be frustrated without them.

Although argued and briefed in the District Court, the order and memorandum opinion appealed from make no mention of the police power. It is this failure to recognize the Florida Act for what it is that led the court to error.

But had the phrase 'police power' never been coined, it would matter little to the final analysis of this case. For the people never surrendered their power to protect against such evils as are contemplated in an oil-spill. Whatever the power to protect in this context be called, the Tenth Amendment is a gentle reminder that it was reserved to the states.

(2.)

Power to protect shore property and the State's natural resources from deleterious effects of a massive oil-spill was reserved to the State.

It is a power and a responsibility peculiarly adaptable to the State. The State has the capacity and, most importantly, the motivation to act in this area to protect itself and its citizens. There is no express delegation of the power to the Federal domain. The Amendment qualifies all grants.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article III, Section 2 (A 94) was found by the District Court to have been offended by the State Act (A 47), but there is no express delegation of power there. That Section speaks to jurisdiction of the Federal courts, and it is respectfully submitted that it should be recognized for what it is. It says the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. For purposes of this controversy, that is all it says. It does not say that substantive maritime law shall extend shoreward to frustrate police power of the state.

To a disturbing extent, from the states' point of view, judicial pronouncements in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920), relied upon by the District Court to support invalidation of the Florida Act, construe the Admiralty Clause in such fashion as to ignore state sovereignty altogether. On their face, those cases establish an autonomous sovereignty within the admiralty, and vest it with far greater dignity than that ascribed to state legislation. In its willingness to follow *Jensen*, and assert an allegiance to this

third dominion, which is seemingly neither state nor Federal but independent of them both, the District Court added to the legend. By 'legend' we refer to the Court's continuing endowment of additional power and scope to the relatively simple phrase in Article III, Section 2. What is, on its face a delegation of judicial power over *cases* of admiralty and maritime *jurisdiction*, has been so broadened that it now authorizes congressional action extending substantive maritime law far beyond its original limits. And each extension, judicial or legislative, more narrowly restricts the dwindling perimeters of state sovereignty.

A definition of "reserved powers" proclaimed by the Tenth Amendment might at one time have included the states' power to cope with and protect against oil-spill pollution of its territorial waters and shoreline. It was, after all, a common law tort, remedial in common law courts. *The Plymouth* 70 U.S. (3 Wall.) 20 (1865); *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886); *Johnson v. Chicago & Pacific Elevator Co.*, 119 U.S. 388 (1886). Although commenced at sea, the tort was not consummated within the ebb and flow of the tide, *Thomas v. Lane*, 2 Sumn. 9 (1834), or on navigable waters, *The Genesee Chief*, 53 U.S. (12 How.) 443 (1851), and was therefore not an admiralty matter. The Plymouth, *supra*. Postulating, then, an oil-spill occurring in 1886, damaging shore property, would have triggered common law tort response from the victim; admiralty would have had no cognizance. Had a state act in 1886 imposed unlimited and absolute liability upon the offending ship's owner, the abstraction 'uniformity' would have afforded scant comfort in defense. For the common law remedy saved to suitors in the Judiciary Act of 1789, (1 Stat. 73, as amended, arguably strengthening the concurrent jurisdiction aspect, 28 U.S.C. § 1333), affords recourse not only to *processes* of state courts, but to the substance of state law as well. *The Hamilton*, 207 U.S. 398 (1907). If Federal jurisdiction carried with it law-making powers, so did concurrent state jurisdiction. *A fortiori*, where there was no concurrent jurisdiction for reason that there was no Federal maritime jurisdiction to start with,

substantive state law establishing remedies and liabilities for sea-to-shore torts would entertain no objections from admiralty.

Not being a matter within the Federal maritime domain at all, such jurisprudence could hardly be considered a subject of *exclusive* Federal jurisdiction. Hence, there was no necessity for a doctrinaire allegiance to principles of uniformity. *Just v. Chambers*, 312 U.S. 383 (1941).

If the abstract doctrine of uniformity can frustrate the states' exercise of reserved powers under the Tenth Amendment by subjecting common law tort action to the full panoply of maritime rules, the reason is almost entirely attributable to the Admiralty Extension Act of 1948, 62 Stat. 496, (June 19, 1948), 46 U.S.C. § 740, (A 93). In that Act, Congress went beyond the farthest horizons of Admiralty Clause power, expressed or inferred, explicit or implicit. The Act re-defines maritime jurisdiction in a manner totally inconsistent with either the Tenth Amendment or Article III, Section 2.

D. Extension of Admiralty: Outside the Limits.

"In regard to torts, I have always understood that the jurisdiction of admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never, I believe, deliberately claimed to have, any jurisdiction over torts, except as such are maritime torts, that is, torts upon the high seas, or waters within the ebb and flow of the tide."
—Mr. Justice Story[43]

"I think it high time to check this silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretentions."
—Mr. Justice Johnson[44]

"Article III impliedly . . . empowered Congress to revise and supplement the maritime law within the limits of the Constitution."
—Mr. Justice Frankfurter[45]

[43] *Thomas v. Lane*, 2 Sumn. 9 (1834).
[44] Concurring opinion in *Ramsey v. Allegre*, 25 U.S. (12 Wheat.) 611 (1827).
[45] *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 361 (1959).

(1.)

By extending scope of maritime tort jurisdiction beyond the locality of navigable waters, Congress exceeded Admiralty Clause authority and intruded upon State prerogatives.

Prior to June 19, 1948, admiralty jurisdiction over torts was limited to the maritime province. Unless it was a maritime tort, i.e., consummated upon navigable waters, it was not extended by Article III, Section 2, to the Federal see. Thus, if a structure on land, a bridge or a pier, were damaged by a vessel, admiralty courts could not hear the cause. *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886); *Johnson v. Chicago & Pacific Elevator Co.*, 119 U.S. 388 (1886); *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908); *The Troy*, 208 U.S. 321 (1908); *Martin v. West*, 222 U.S. 191 (1911). But see Mr. Justice Brown, concurring, in *The Blackheath*, 195 U.S. 361 (1904).

In *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), seamen sued for wages in admiralty. In a four-paragraph opinion, Mr. Justice Story affirmed dismissal by the lower court for lack of jurisdiction for reason that the Missouri River voyage of the vessel was not within the ebb and flow of the tide, and, hence, "in no just sense can the wages be considered as earned in a maritime employment."

In *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), Mr. Justice Taney broadened this concept to navigable waters, but he can hardly be said to have precluded necessity for getting one's feet wet before one's cause sounds in admiralty. Maritime cases and congressional authority arise not under operation of the Commerce Clause, The Genesee Chief, *supra; The Eagle*, 75 U.S. (8 Wall.) 15 (1868), nor "the Constitution or laws of the United States", *American Ins. Co. v. Canter*, 26 U.S. (1 Peter) 511 (1828). Solely within the Admiralty Clause does the source of congressional power

repose. Since congressional power can only be co-extensive with that stored in Article III, Section 2, a determination of the limits of that grant is necessary. National legislation extending beyond boundaries of that power is, by definition, without constitutional authority to conflict with state statutes. The suspicion that this trespass occurs is limited neither to our time nor subject area. See the concurring opinion of Mr. Justice Johnson in *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611 (1827).

There is no absolute constitutional criterion for the measurements of whatever it is that is necessary and proper to enable Congress to implement Federal jurisdiction over admiralty. But it has been traditionally recognized that such implementation is limited to that which is, in substance, maritime. In the case of contracts, substance is measured by the nature of the transaction. In the case of tort, substance is measured by locality. This guide to qualitative analysis was treated as settled law 50 years ago. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 476 (1922), and reiterated as recently as last December. *Victory Carriers, Inc. v. Law*, 404 U.S. , 30 L.Ed.2d 383, 387-389 (1971). This is inference only. Article III, Section 2 makes no mention of either "nature" or "locality."

The State of Florida has no particular quarrel with the inference. As a basis for placing the line of demarcation between the dominion of admiralty and that of non-admiralty at the shoreline, it comports with reason and logic. But it is unreasonable, illogical, and *dehors* the "historic view of this Court" (Victory Carriers, Inc. v. Law, *supra*) to extend maritime tort jurisdiction, and all that it implies, beyond the traditional admiralty domain. That is what Congress had done in The Admiralty Extension Act of 1948. It has established a beachhead of rules, limitations, and defenses peculiar to the law of the sea well within the dry-land dominion of state jurisdiction. In so doing it has forceably imposed these sea-lawyer concepts upon unwilling subjects; the states protest.

Congress, in the Admiralty Extension Act, and the District Court, in striking the State Act, ignored the protest and shaped new dimensions to maritime torts. Admiralty tort jurisdiction has been rendered amphibious. No longer does locality matter: admiralty lives as well upon the land as on the sea. In the space of one opinion, the District Court effectively *overruled* more than 150 years of this Court's interpretation of the substance of maritime law and the jurisdictional grant of Article III, Section 2.

This Court, in Victory Carriers, Inc. v. Law, *supra*, quoted with approval from its decision in *Healy v. Ratta*, 292 U.S. 263, 270 (1934), that "(t)he power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution." Prior to the Admiralty Extension Act of 1948, interpretations of the "judiciary sections of the Constitution" by this Court scrupulously maintained the shoreline demarcation between admiralty and non-admiralty discussed above. Congress was without judicial guidance in assaulting this long-established and judicially approved distinction between state and maritime regimes. It was also without any constitutional authority for doing so.

No act of Congress can enlarge purposes of the grant of jurisdictional power conferred in Article III, Section 2, to make it broader than the judiciary has determined to be its true limits. *The Steamer St. Lawrence*, 66 U.S. (1 Black) 523, 527 (1861). While Congressional power to determine what the maritime law throughout the United States shall be is paramount, *The Lottawanna* 88 U.S. (21 Wall.) 558, 577 (1874), the Congress must necessarily act within a sphere of judicial concepts of the substance of admiralty and maritime jurisdiction. *The Belfast*, 74 U.S. (7 Wall.) 624, 636-641 (1868); *Crowell v. Benson*, 285 U.S. 22, 55 (1931).

In extending admiralty and maritime jurisdiction over torts consummated on land, Congress ignored established judicial concepts and exceeded its authority. The Admiralty Extension Act is invalid. If the thrust of *Victory Carriers* is to continue as a compass heading to circumscribe boundaries between

state and maritime regimes, the District Court decision in the case *sub judice* must be reversed.

(2.)

Should this Court decide the Admiralty Extension Act to be valid on its face, traditional common law jurisdiction saved to suitors in 28 U.S.C. 1333 marks a preserve of concurrent state authority.

As has been noted, "extension of admiralty" is a theory of law unknown to traditional maritime jurisprudence. Courts of admiralty had no jurisdiction over torts consummated on land. Cases involving such wrongs, even though initiated on navigable waters, eluded admiralty jurisdiction altogether prior to 1948 and the Congressional enactment of 46 U.S.C. § 740. Hence, such actions could in no way be deemed to be within the *exclusive* jurisdiction of admiralty and maritime law.

If admiralty jurisdiction for such torts exists for reason that their genesis is some act or failure of action originating on navigable waters, it is solely because Congress ordained it. Perimeters of admiralty jurisdiction over such tort actions are staked out in the Admiralty Extension Act—the length and breadth of Federal dominion in this context is described there. It is purely a matter of congressional will: all that the national legislature intended for the admiralty courts to have is blueprinted in the Act. Had Congress intended such domain to be exclusively Federal, it would have been easily accomplished. In the Ships Mortgage Act of 1920, 41 Stat. 1003, 46 U.S.C. 951, for example, the exclusivity of jurisdiction is spelled out in conclusive terms. See, generally, *The Thomas Barlum*, 293 U.S. 21 (1934). Had exclusive jurisdiction been so prescribed, an argument could be made that the Admiralty Extension Act amended such "hybrid" torts out of their common law status. But legislative history of the Act indicates rather conclusively that its passage signified no intentional intrusion upon common law jurisdiction.

> Adoption of the bill will not create new causes of action. It merely specifically directs the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, section 2 of the Constitution and already authorized by the Judiciary Acts. Moreover, there still will remain available the right to a common-law remedy which the Judiciary Acts . . . have expressly saved to claimants. * * * (Senate Report No. 1593, June 11, 1948 (To accompany H.R. 238); House Report No. 1523, March 8, 1948, 80th Cong., 2d Sess., 1948.)

Inasmuch as sea-to-shore torts (particularly within the context of oil-spill remedies) were unreachable in admiralty's formative century, and therefore well within concurrent state jurisdiction, they cannot be said to be within that chosen area of law exclusively delegated to federal maritime domain. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Strict precepts of uniformity that bottom this Court's rationale in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) are not required here.

If states have concurrent jurisdiction over maritime torts, there must be available to them an area of legislative activity to develop or extend remedies for wrongs, *Cf. The Tungus v. Skovgaard*, 358 U.S. 588 (1959), and this area must be broad enough to accomodate new concepts of tort. Surely the state is not limited to antiquated forms of action, i.e., trespass on the case, in an era when experts tell us we are capable of ultimately befouling our air and water, or vitally injuring an economy based squarely on a clean environment, as Florida's is today. If "concurrent jurisdiction" is more than a theory, but is amenable to practice, then the only question at this juncture is whether the state still retains concurrent jurisdiction over maritime torts. There is no question but that it was a state prerogative when the Constitution was developed. We were reminded of this fact in the dissenting opinion of Mr. Justice Brennan in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 404-405 (1959):

Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the Constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in the cases where the jurisdiction of common law and admiralty are concurrent, (as in cases of possessory suits, mariners' wages, and maritime torts), there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, on general reasoning, to contend for it. The reasonable interpretation . . . would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. 3 Story's Comm. Sec. 1666, note. [quoted in *Taylor v. Carryl*, 61 U.S. (20 How.) 583, 598 (1857).]

Assuming that concurrent jurisdiction still means that which Mr. Justice Holmes described in *The Hamilton*, 207 U.S. 398 (1907), then substantive state law is appropriate to meet exigencies of an oil-spill age (so long as it is not in conflict with Federal law) regardless whether admiralty is extended or not. There must be room for protection the State Act affords. If such protection is provided by Federal law, then the State has no quarrel. The Florida Act is more than merely an advertisement to promote business for its courts. It is the substance of the protection that is urgent here; not the choice of court rooms.

If the protection against oil-spill pollution and damage is not afforded in the Federal sphere, of course, then this Court must consider yet another constitutional question: to what extent may the individual citizen rely upon the Ninth Amendment to reassure his fundamental right to a healthy environment?

(3.)

To the extent that Federal law fails to protect citizens of the state from loss of property and damage to natural resources, the state has a right and a duty to legislate in the area of marine oil-spill pollution control.

The essence of the District Court's opinion appealed here is that Chapter 376, Florida Statutes (1970) conflicts directly with paramount Federal enactments and is in other ways violative of admiralty's constitutional prerogatives. While the State of Florida denies any such violations or conflict, the State also maintains that even if the District Court's assertion as to conflict were correct, the State Act must be recognized as a valid expression of a fundamental right of the people to self-preservation.

Congress has recognized this right to a healthful environment. At Section 101 (c) of the National Environmental Policy Act of 1969, P.L. 91-190, 42 U.S.C. §§ 4331-47, Congress declares:

> The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

The Fifth Circuit Court of Appeals has judicially acknowledged the necessity of protecting our environment for the survival of man, and has also noted the devastating effect of environmental despoilment upon interstate commerce. In *Zabel v. Tabb*, 430 F. 2d 199 (5th Cir. 1970), at pages 203-204, Chief Judge Brown stated:

> In this time of awakening to the reality that we cannot continue to despoil our environment and yet exist, the nation knows, if Courts do not, that the destruction of fish and wildlife in our estuarine waters does have a devastating effect on interestate commerce.

None of the Constitutional provisions or Federal laws asserted by maritime interests can be interpreted so as to deprive the citizens of the State of Florida of their right to a clean and healthful environment. Not only is this right recognized by Congress and the Courts (see, also, dictum in Huron Portland Cement Co. v. City of Detroit, *supra.*), but it is also a fundamental right of the people, saved to them under the Ninth Amendment to the Constitution, which provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

In *Griswold v. Connecticut*, 381 U.S. 79 (1965), the Court found at page 484, per Mr. Justice Douglas, that

> * * *specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

Justice Goldberg, in a separate opinion, joined by the Chief Justice and Mr. Justice Brennan, stated, at page 487:

> In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, ante, at 515. I add these words to emphasize the relevance of the Amendment to the Court's holding.

Continuing, at page 488, Justice Goldberg stated:

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the First eight Constitutional Amendments.

And, at page 489:

> These statements of Madison and Story make clear that the Framers *did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.* (Emphasis Added.)

Justice Goldberg then summarized, at page 493:

> In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

The Justice then explained, also at page 493, how to determine which rights are reserved under the Ninth Amendment:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to "traditions and [collective] conscience of our people" to determine whether a principle [is] "so rooted [there] . . . as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105, 78 L. Ed. 674, 677, 54 S. Ct. 330, 90 ALR 575. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating 'fundamental principles of liberty and justice which lies at the base of all our civil and political institutions' . . ."

It should brook no argument to state that the right to a clean, healthful environment is within the "penumbra" of fundamental rights protected under the Ninth Amendment. This right as the Court recognized in Zabel v. Tabb, *supra*, is essentially the right to exist; certainly, it is so rooted in the tradition and collective conscience of our people as to be ranked as fundamental. The people of the State of Florida

have acted through their legislature to protect this fundamental right by the enactment of Chapter 376, Florida Statutes (1970). In the State Act, the people are asserting their right to protect their birthright to clean water, coastlines, and other natural resources from environmental destruction. Their right to take up statutes in defense of their environment is no different, except to a matter of degree, from their right to take up arms to defend against armed attack. Before this constitutionally guaranteed right, all other rights and privileges must bow.

E. The Jensen Doctrine is Inapplicable

> *"The Florida Act here constitutes a far greater intrusion into the Federal maritime domain than the New York statute in the* **Jensen** *case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect—in the words of Jensen—the "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish . . . We need not belabor the point that to permit the states severally to regulate these industries as Florida seeks to do would sound the death knell to the principle of uniformity."*[46]

> *"We are now asked to apply the Jensen doctrine to the field of unemployment insurance and to invalidate the statute before us on the ground that it is destructive of admiralty uniformity . . . . The Jensen Case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws."*[47]

(1.)

Jensen's absolute prohibitions against state legislation affecting maritime commerce must remain limited to the arena of its own facts.

[46] Memorandum opinion of the District Court, A 44.
[47] *Standard Dredging Corporation v. Murphy*, 319 U.S. 306, 309 (1942).

It is respectfully submitted that in drafting *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), this Court used a very broad-nibbed pen. Any state legislation was declared to be invalid when it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U.S. at 216. It is difficult to conceive of a state statute affecting maritime commerce which would stand guiltless of some intrusion into those prohibited areas. Even state statutes subsequently approved by this Court, i.e., *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), are not totally free of a mild trespass into that yard marked "uniformity". It is, perhaps, for this reason that a later decision limited application of the Jensen doctrine to workmen's compensation cases, *Standard Dredging Corporation v. Murphy*, 319 U.S. 306 (1942), and the requisite "uniformity" concept to those situations "where the essential features of an exclusive federal jurisdiction are involved." *Just. v. Chambers*, 312 U.S. 383, 392 (1941).

In any event, the District Court misapplied the Jensen rule in the present context. The Jensen decision, by strong implication at least, limits its application to those areas of jurisprudence within the exclusive federal maritime domain. At 244 U.S. 218:

> * * *The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, encapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction.

As discussed above, the Florida Act concerns sea-to-shore torts, triable only before common law courts at the time the Jensen Case was decided. If the Admiralty Extension Act can be said to bring an oil-spill damage action within maritime tort jurisdiction, it also remains within the purview of the common law as a tort. If concurrent jurisdiction exists, states are free to legislate within that jurisdiction, and the "uniformity" concept of *Jensen* cannot coexist with such

state power. In resting a corner of its case upon the Jensen doctrine in this context, the District Court erred.

F. Limitation of Liability Means No Recovery.

> *"Even if fault was established, the vessel-owner's financial responsibility for property damage would be limited to the value of the vessel at the end of the voyage, plus the "freight then pending," unless the damage was caused with the owner's privity or knowledge."*[48]

> *"That object was to enable merchants to invest money in ships without subjecting them to the indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment."*[49]

> *"The notion as applicable to a collision case seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, 'If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me.' "*[50]

(1.)

In a conflict of interests between the State in protecting against effects of an oil-spill, and the maritime in protecting shippers from claims resulting therefrom, the State's interest is dominant.

Whether or not this Court determines that the Admiralty Extension Act is invalid as applied in the context of the case *sub judice*, the problem of *Richardson v. Harmon*, 222 U.S. 96 (1911) remains. In an oil-spill frame of reference, the Limitation of Liability Act, 9 Stat. 635, 46 U.S.C. §§ 181-189, would frustrate justice regardless of the forum or legal theory applicable. In *Richardson*, a tort claim arose from collision of a ship with a bridge. A limitation proceeding was upheld *despite the non-maritime nature of the tort.*

[48]Memorandum opinion of the District Court, A 43.
[49]Mr. Justice Bradley in *The City of Norwich*, 118 U.S. 468, 504 (1886).
[50]Mr. Justice Holmes in *Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48, 53 (1919).

In *Moragne v. States Marine Lines*, 398 U.S. 375, (1970), this Court discarded antiquated notions circumscribing recovery in a wrongful death action, and overruled *The Harrisburg*, 119 U.S. 199 (1886). Underlying the Court's rationale was a concern that it was unfair and unjust for general maritime law to allow recovery for injury, but not for death. There was no jusitification for the dichotomy beyond a stultified adherence to the ancient felony-murder doctrine. Rule had supplanted reason. No one knew *why The Harrisburg* held as it did; the fact of the holding was sufficient for subsequent cases. See, *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

The State of Florida is not unaware of the reluctance of the Court to overrule precedent. But if Richardson v. Harmon, *supra*, is of sufficient vitality to permit limitation proceedings to frustrate fair recovery in a common law tort action for damages to shore property arising from an oil-spill, then that case must be overruled or sharply limited in application. Reasons underlying development of the concept of limitation of liability never contemplated the severe damage of a massive oil-spill. Public policy on the side of the state is far more urgent than that on the side of maritime interests, particularly with marine liability insurance weighed into the balance. There is no justification today for protecting owners and charterers of tankers to the detriment of the State and its citizens.

The Limited Liability Act cannot co-exist in the same courtroom with the Florida Act. Although 46 U.S.C. § 183 is limited to sea-going vessels, § 188 applies the limitation to "all vessels used on lakes or rivers or inland navigation, including canal boats, barges, and lighters," and § 189 has been construed to abrogate common law rights to substantive remedies saved to suitors altogether. Compare, Richardson v. Harmon, *supra*, with *The Hamilton*, 207 U.S. 398 (1907), and *Ex parte Phenix*, 118 U.S. 610 (1886); see Gilmore and Black, THE LAW OF ADMIRALTY (1957), at p. 677. Lower courts have indicated rather conclusively that state statutes and local ordinances which regulate maritime commerce on

canals and harbors have no effect upon limitation proceedings under the Act. *The Grand Republic–The Nassau*, 29 F.2d 37 (2d Cir. 1929); *The South Shore*, 35 F.2d 110 (3rd Cir. 1929) *cert. den.* 281 U.S. 722 (1930); *The Central States*, 9 F.Supp. 934 (E.D.N.Y. 1935).

There is no question but that particular advantages afforded maritime interests by the Limitation of Liability Act would, assuming continued vitality of Richardson v. Harmon, *supra*, and 46 U.S.C. § 189, clash head-on with absolute and unlimited liability aspects of the Florida Act. But it also conflicts directly with Section 1161 (f) of the Federal Act (A 81). For the Federal Act, "notwithstanding any other provision of law", imposes liability upon "such owner or operator of any vessel from which oil is discharged in violation . . . for the actual costs incurred . . . for the removal of such oil by the United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser . . . ." The section goes on to state that the costs shall constitute a maritime lien against the vessel and that an *in rem* action may be brought against the vessel to collect the amount due. But more significantly, it further provides that an action may also be brought against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs. Limitation of liability codified with 46 U.S.C. § 183, gives way before the emphatic (and subsequent) language of the Federal Act.

Having given way before the Federal Act, are these maritime fictions elastic enough to snap back into place to frustrate a legitimate exercise of the police power of the state? Defendants submit that they are not, that what is appropriate for a Federal act purporting to control water standards is no less appropriate for a state act seeking to achieve the same end.

Dominant state interests which would be frustrated by unbridled application of the Limitation of Liability Act have been described above. But there is another basis for denying this particular aspect of maritime law as a ground for striking

the Florida Act. It is contemplated in the phrase "due process of law", and it is the fundamental right of every individual deprived of his property or the use of it by operation of the government.

(2.)

Limitation of liability in the present context is a bad use of a good legal theory.

Limitation of ship-owners' liability first appeared in the 14th Century as a means of encouraging investment in shipping. *The Rebecca*, 20 F. Cas. 373, 376 (No. 11, 619) (D. Me. 1831); Gilmore and Black, THE LAW OF ADMIRALTY, (1957) pp. 663-667; Note, 35 Columbia L. Rev. 246 (1935). Shipping was risky business, and insurance was unknown. It was necessary to devise a means whereby one's entire fortune didn't go down with part of it in a loss at sea. Limitation of liability concepts were developed to meet the risks and by 1800 had been codified in most maritime countries. The United States enacted its first limitation statute fifty years later. 9 Stat. 634 (1851), as amended 46 U.S.C. § § 181-189 (1964). Like other legislation, it was congressional response to an unfortunate occurrence at sea. When the *S. S. Lexington* left the port of New York in 1840, part of its manifest included a box, contents unknown. When it sank, its owners were held liable for the full value of those contents: $18,000 in gold. *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. (6. How.) 344 (1848). The Limitation of Liability Act was, in part, a result of this case.

Statutes of limitation were designed to insulate ship-owners from claims of cargo-owners and passengers who have contracted with the ship-owner, or his agent, for carriage or passage. Presumably passengers and cargo-owners are fully aware of the risks of maritime transport. Possibility of negligence on the part of captain or crew is an accepted hazard. The parties are *in privity*, so to speak, and it is neither unreasonable nor improper that this voluntary rela-

tionship should subject them to peculiarities of the law of the sea, not the least of which is a limitation of the owner's liability.

But what of parties not *in privity* with operation of cargo or passage, whose only relationship is an unwilling one in that they have been damaged by some maritime instrumentality? Is it reasonable or proper that persons innocent of the sea should be subject to its laws?

Since its creation in 1851, the Limitation of Liability Act has been legislatively and judicially extended to cover subjects, situations, and localities which would have seemed revolutionary to owners of the *S. S. Lexington*. It has been extended to all navigable waters, regardless of size, 24 Stat. 80 (1886), to all vessels regardless of size or employment, *The Titanic*, 233 U.S. 718 (1914); Harolds, *Limitation of Liability and its Application to Pleasure Boats*, 37 Temp.L.Q. 423 (1964), and to torts consummated on land, *Richardson v. Harmon*, 222 U.S. 96 (1911), including massive oil-spills, *In re Barracuda Tanker Corporation*, 281 F.Supp 228 (S.D.N.Y. 1968), *modified* 409 F.2d 1013 (2d Cir. 1969).

Extension of limited liability to lakes and pleasure craft is questionable; its extension to frustrate recovery by innocent parties ashore is unconscionable. When it crosses the shoreline, as in *Barracuda Tanker*, it crosses the limits of constitutionality. For it has the effect of (a) leaving the *locality* of the constitutional grant in Article III, Section 2, discussed above, and (b) violating the Fifth Amendment right to substantive due process of law necessarily attendant to any deprivation by government of private property for a public purpose. (And if there is no public purpose advanced in the Limited Liability Act, then there is no foundation for the law in the first place.)

The distinction in application of the Limitation of Liability Act demonstrated here is not a distinction without a difference. For it is not unreasonable to require a cargo-owner who has contracted for carriage of his goods to be limited in his recovery. Carriage of Goods By Sea Act, 49 Stat. 1207

(1936) § 8, 46 U.S.C. § 1308; the Harter Act, 27 Stat. 445 (1893) § 6, 46 U.S.C. §§ 190-195. He is deemed to have contracted for such services with full knowledge of limitation. But to impose the limitation formula upon the recovery of a beach-front hotel owner is to deprive him of a necessary element of substantive due process.

If we define substantive due process as a constitutional guarantee that no person shall be deprived of his property for arbitrary reasons without meaningful recourse, the difference in the distinction becomes clear. Such deprivation of property is constitutionally acceptable only if the conduct from which the deprivation flows is proscribed by reasonable legislation reasonably applied. The implication here is that the legislation must be applied for the purposes intended, and that those purposes must comport with the Constitution. The essence of substantive due process is freedom from arbitrary action with property no less than life or liberty. *Cf. United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Causby*, 328 U.S. 256 (1946); *Nebbia v. New York*, 291 U.S. 502 (1933); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Twining v. New Jersey*, 211 U.S. 78 (1908).

To the extent that a massive oil-slick smears a beach-front hotel thereby driving away guests and hurting his other business, the owner of the hotel should have a remedy. If under limitation proceedings, the ship-owner may limit his liability to the hotel-owner by the value of a sunken wreck, the plaintiff is deprived of the basic element of his right, to wit, compensation. Remedial action afforded in admiralty courts, or in commonlaw courts occupied by the Limitation of Liability Act, is no remedy at all in this context. To the extent that an act of Congress compels this deprivation of property without due process of law, the Fifth Amendment is violated. If the Limitation of Liability Act is not unconstitutional on its face, it quickly becomes so under this application. Due process of law is a concept intended to protect individuals from such an arbitrary exercise of government power "unrestrained by the established principles of private rights and distributive justice." Twining v. New Jersey, *supra*.

In a totally different context, Mr. Justice Frankfurter once commented: "The use of a legal remedy devised for a simple situation might in a totally different environment become a perversion of that remedy." *Mayo v. Lakeland Highlands Can Co.*, 309 U.S. 310, 322 (1939).

This is the heart of the problem. To employ limitation of liability in a manner never intended (nor even conceived when the act was passed) to frustrate full recovery of a claimant under circumstances to which the Florida Act is directed, is a perversion of the original intent of the Limitation of Liability Act and an unconstitutionally arbitrary use thereof.

The Florida Act seeks to provide a remedy for its citizens where none exists. May an unconstitutional application of a maritime statute be the basis for striking the Florida Act? The State respectfully submits that it may not.

II

The Water Quality Improvement Act of 1970 In No Way Preempted the States From Imposing Requirements and Liabilities to Protect Against Massive Oil-Spill Pollution of Their Territorial Waters—Instead, It Describes A Joint Federal-State Scheme to Combat A Serious Economic and Environmental Problem.

A. Preliminary Statement

> *"Our environmental problems stem largely from a pressing need to emerge from the entire system of legal theory and precedent that guided us during the first century of industrialization in this country."*[51]

To consider issues arising under this general question, it is necessary to define relative positions. To declare position is to imply certain priorities. The position of the State of Florida

[51] Hon. Edmund S. Muskie, *Torts, Transportation, and Pollution: Do the Old Shoes Still Fit?* 7 Harvard Journal on Legislation 477, 492 (1970).

rests on several premises. First, that there will be no "losing side" to this controversy. Issues at bar are so far-reaching and of such serious social, economic, and environmental consequence that, once resolved, the whole fabric consisting of state, Federal, and maritime interests, will be benefitted. Second, this case should not be decided solely upon historical interests asserted by state or maritime parties as predominate, one over the other. Nor is it appropriate to arrive at a holding based solely upon prior decisions. For cases supporting exercise of the state police power, and those establishing rigid principles of uniformity in matters maritime are of equal dignity; they form long lines, but on parallel planes. The last word in either cause will probably not be spoken here. If jealously guarded prerogatives of state and maritime interests receive added impetus in new directions as a result of this appeal, it will be incidental to the essential question decided.

It is true that Florida has a responsibility to protect its citizens and its environment from dangers of a massive oil-spill, assuming that no other protection is afforded. We do not understand the District Court or maritime interests to deny this. It is equally true that maritime law, if not a *corpus juris* existing independently of state and national influences, must continue to develop in a cohesive, universally recognized pattern. Florida has no quarrel with this.

These ambitions are not mutually exclusive. That they conflict in the instant appeal is because they were considered by the District Court in terms of hornbook precedent. But dogmas of the stormy past, to paraphrase Mr. Lincoln, are inappropriate to govern crises of the age of supertankers. Rules of decisions applicable to wrongful death or workmen's compensation cases cannot be rigidly applied in this context. "Uniformity" is an abstraction; it cannot be the *sine qua non* of every regulation affecting maritime commerce. Causes of regulation will not be the same in each instance. Where problems to be controlled differ, regulations effecting control will differ.

It is the position of the State of Florida that the State Act should not be judged by its conflicts with ancient tenets of maritime law, but by its response to challenges expressed in the Federal Act. Those challenges call for a combined Federal-State operation to combat a major threat to our environment. To the extent that the maritime industry resists this response, it sets itself apart, disputing not merely the State of Florida, but the national policy as expressed in the Federal Act, and the urgent priorities of other coastal states as well.

B. The Federal Act

> *"It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature."*[52]

> *"Historians have noted that over the centuries, Oriental despotism has been associated with centralized control of water resources."*[53]

(1.)

As compared to the Florida Act, The Federal Act defines the problem and declares national policy while contemplating State participation in the enforcement of it.

Congress declares it to be policy of the United States "... that there be no discharge of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." § 1161 (b) (1); A 76, and prohibits such discharge in harmful quantities,

[52]Mr. Justice Holmes in *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

[53]Graham, DISASTER BY DEFAULT: POLITICS AND WATER POLLUTION, 25 (1966). The remark is attributed to a corporate official at a legislative hearing, and is quoted in Note, *Private Remedies For Water Pollution*, 70 Columbia L. Rev. 731 (1970).

§ 1161 (b) (2), A 76. The Florida Act prohibits discharge of defined pollutants, § 376.03 (7); A 58, "into or upon any coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state . . . ." § 372.04; A 59-60, for reason that preservation of the use of the seacoast is "a matter of the highest urgency and priority . . ." § 376.02 (1) (2); A 56. Certainly, navigable waters of the United States include coastal waters and estuaries of the State of Florida. To this extent, the two Acts over-lap in territorial application. Also, the area denominated "coastal waters" in the Florida Act must be limited to state territorial waters. This does not include the contiguous zone on the Atlantic coast, but does so on the Gulf coast. *United States v. Florida*, 363 U.S. 121 (1960). The Federal Act could conceivably exempt certain spills occurring in the contiguous zone, § 1161(b)(2)-(3); A 76-77, but the Florida Act would not. A vessel entering or leaving any Florida port would be within the territorial application of the Florida Act and would be liable under the Act for a discharge occurring within the three mile limit on the Atlantic and within three marine leagues of shore in the Gulf of Mexico.

The Federal Act provides certain defenses. § 1161(f)(1); A 81. The Florida Act does not; although a hearing panel may decide defenses similar to those in the Federal Act are appropriate to a given case, and waive reimbursement for cleanup costs and penalties. § 376.11(6)(c); A 67-68.

The Federal Act limits liability for cleanup costs to the lesser of $100 per gross ton of the vessel or $14,000,000, unless the United States can show that willful negligence or misconduct "within the privity and knowledge of the owner" caused the discharge. § 1161(f)(1) A 81. The Florida Act holds an offending licensee absolutely liable (subject to possible application of defenses noted above) for "all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others." § 376.12; A 68.

Both Acts provide civil penalties for their violation. The Federal Act imposes up to a $10,000 penalty upon owners or

operators of vessels or onshore or offshore facilities "from which oil is knowingly discharged" in violation of the Act, and allows for "compromise" of the sum assessed. § 1161(b)(5); A 77-78. In addition, the Federal Act calls upon the President to issue regulations "consistent with maritime safety and with marine and navigation laws" establishing procedures for removal of discharged oil, criteria for implementation of contingency plans, containment gear requirements, and inspection of vessels and cargo, § 1161(j)(1); A 85, then imposes a $5,000 penalty upon owners, operators, and other persons subject to regulations described who fail or refuse to comply therewith. § 1161(j)(2); A 85. The Florida Act subjects violators of the statute or regulations of the Department of Natural Resources to civil penalties of up to $50,000, with each day the violation occurs constituting a separate offense. However, if the discharge is promptly reported and removed, penalty provisions do not apply. § 376.16; A 71.

Both Acts require evidence of financial responsibility on the part of owners or operators of vessels. The Federal Act requires such of vessels over 300 gross tons measured by $100 per gross ton up to $14,000,000 to meet the liability of the United States. Where one owner operates, owns, or charters more than one vessel, financial responsibility is measured by the tonnage of the fleet's largest vessel and no more is required. Claims may be brought directly against the insurer. § 1161(p)(1); A 88.

Under the Florida Act, financial responsibility requirements are imposed upon owners and operators of terminal facilities as well as vessels. The evidence of such financial responsibility is measured by capacity of the terminal facility, tonnage of the ship, cargo carried and "other similar factors" to which the vessel could be subject under the Act. No limitations upon the amount of financial responsibility to be required by the Department of Natural Resources are set forth in the statute. Direct action against an insurer for costs of cleanup, civil penalties, and damage claims is provided. § 376.14; A

70. The direct action provision should cause no difficulty in light of recent trends, *Cf. Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954).

Both statutes provide for boarding vessels to enforce their respective provisions, and both provide criminal sanctions. The Federal Act provides that one authorized by the President may board and inspect vessels covered by the Act and arrest anyone who violates any section of the Act or appropriate regulations "in his presence or view." § 1161 (m); A 86. As noted above, the President may also issue regulations related to boarding and inspection of vessels, § 1161(j)(1); A 85. Any person in charge of a vessel on onshore or offshore facility who fails to immediately report a discharge of which he is aware is subject to a fine of up to $10,000 and imprisonment up to one year under the Federal Act, compared with a fine in like amount or imprisonment for up to *two* years under the Florida Act. § 1161(b)(4); A 77; § 376.12; A 68-69. A port manager designated for each of the 11 deep water ports in the state is authorized under the Florida Act to board any vessel prior to its entry into port to ascertain seaworthiness of the vessel and presence on board of required containment gear. He has authority in the event of discharge to refuse entry, direct the ship back out to sea, require it to drop anchor, or direct it to a specific dock for deployment of containment gear. § 376.07(c); A 62-63.

Most significantly, the Federal and State Acts interrelate rather than conflict. Implicit in both statutes is cooperation rather than competition. The Federal Act sets the pattern.

The National Contingency Plan authorized in § 1161(c)(1), A 78-79, speaks to *coordination of efforts* toward containment, dispersal, and removal of oil with State and local agencies. Nowhere does it imply that the Federal authorities shall act alone when State-level assistance is available.

In the event of a "marine disaster," § 1161(d), A 80, the Federal Act again speaks to coordinating all public and private efforts.

In the section immediately following, express recognition is given to the fact that actual or threatened discharge of oil will prompt State and local action, § 1161(c), A 80, and that *in addition* to this action, Federal officials may be required to act.

The limitations capped upon negligence liability expressed in § 1161(f), A 81, relate to claims by the United States *alone* for any cleanup costs sustained by its agencies. Nowhere does the Federal Act suggest that the United States alone will suffer cleanup costs at all. Nothing in this section precludes costs or claims on the part of State agencies or private individuals being assessed against the offending vessel owner. Clearly, to the extent cleanup costs are incurred by the State, they need not be assessed by the United States.

Local and regional oil removal contingency plans are contemplated in § 1161(j)(1), A 85, as further recognition of the State-Federal coordination necessary in the context of oil-spill pollution.

A strong indication that Congress did not intend the Federal Act to operate within the exclusive maritime purview is found in § 1161(n), A 87, where an express grant of jurisdiction to district courts is declared. Had Congress considered the Federal Act part of the woof and substance of general maritime law, such jurisdictional statement would hardly have been necessary.

Finally, § 1161(o) expressly disclaims any intention on the part of Congress to preempt the states "from imposing any requirement or liability with respect to the discharge of oil into any waters within such State." A 87. To this, the District Court commented:

> It has long been recognized that Congress is powerless to confer on the states authority to legislate within the admiralty jurisdiction (Citations omitted) and we cannot presume that W.Q.I.A. was an attempt to do so. There is nothing in the language of the act which purports to grant

any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative. (A 45-46)

For reasons and under authority set out in Part I of this brief, the State of Florida respectfully demurs. First, it is submitted that states already have authority to legislate in the admiralty jurisdiction, *Wilburn Boat Co. v. Firemans Fund Ins. Co.*, 348 U.S. 310 (1955); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), and did not necessarily depend upon the Federal Act for support of that authority. To conclude that there is no language in the Federal Act purporting to authorize legislation such as the State Act is to either ignore Section (o)(2) altogether or to suggest that Congress didn't mean what it said.

Where there is to be preemption, there must be a collision of inconsistent obligations. In such event, supremacy dictates that state statutes shall give way before their Federal counterparts to the extent of the inconsistency. But the congressional intent must be certain and unequivocal; preemption will not be inferred.

The question is obvious: Where in the Federal Act does Congress state its intention to preempt the field of oil-spill control? Congressional intent is clearly stated, but the result is opposed to preemption, not in favor of it.

Section 1161 (o) is as strong as it is certain. The language requires no detailed analysis as to meaning or import. Legislative history of the section may be found in *U.S. Code Congressional and Administrative News*, May 5, 1970, page 809. Although there is some discussion of other parts of Section 1161, there is no mention found of subsection (o)(2). Apparently Congress was satisfied with the clear and simple statement that the Federal act was never meant to preclude state legislation in the area of marine oil-spill pollution control. If, in their respective acts, states felt called upon to

impose a standard of liability distinct from that appearing in the Federal Act, it is patently clear that Congress did not intend to interfere. The phrase "any requirement or liability" is broad enough to encompass absolute and unlimited liability for those who cause oil-spill pollution.

The danger of massive oil-spill pollution is both a State and Federal problem. The Federal Act provides a regulatory remedy. Where the oil-spill occurs and the affected state refuses to act, or is incapable of action for reason that it happens beyond territorial waters, Federal machinery is thrown into operation under authority of the Act. But where a state is prepared and willing to participate, the Federal Act leaves room for state action. In the not unlikely event that a spill affects more than one state, the Federal role is one of coordinating emergency response by all agencies. The National Contingency Plan speaks to this. The Federal Act is a clarion call to national-state cooperation. It is not an obstruction in the path of states who seek through local legislation to afford recompense to themselves for their costs and a remedy for their citizens who suffer damage as a result of an oil-spill.

To permit the negative lesson of *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) to frustrate this expression of federalism would be to ignore an opportunity. The District Court determined that *Knickerbocker Ice Co.* was still vital enough to control its interpretation of the Federal Act. This overlooks (a) the limited purpose for which that case was decided, and (b) the strong, logical dissent of Mr. Justice Brandeis in *Washington v. W.C. Dawson & Co.*, 264 U.S. 218, 228-239 (1924). It is respectfully submitted that the Brandeis dissent reaches optimum application in the case *sub judice*. At 264 U.S. 234:

> A further assumption is that Congress, which has power to make and to unmake the general maritime law, can have no voice in determining which of its provisions require adaptation to peculiar local needs, and as to which absolute uniformity is an essential of the proper harmony of international and interstate maritime relations. This assump-

tion has no support in reason; and it is inconsistent (at least in principle) with the powers conferred upon Congress in other connections.* * *

Here we are not dealing with workmen's compensation or wrongful death legislation—non-common law statutes which affect, as far as admiralty is concerned, those in privity with matters maritime. Rather, we are dealing with a vast, inter-related scheme of control and abatement of oil-spill pollution. Mr. Justice Brandeis called upon the Court to overrule Southern Pacific Co. v. Jensen, *supra*, and *Knickerbocker Ice Co.* If these cases are still strong enough outside the arena of their facts to defy congressional approval of the State's exercise of its police power in the present context, then Florida joins Justice Brandeis' call.

If the Federal Act speaks to substantive maritime law as the District Court assumed, despite clear indications within the Act itself to the contrary, the State Act must be recognized as supplementary to it. Substantive state statutes have been upheld as such. *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479 (1922); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921). This, too, is an expression of federalism.

(2.)

If Federalism is more than an academic theory, it requires expression in the instant case.

Article III, Section 2, implemented under authority of Article I, Section 8, United States Constitution, in the Judiciary Act of 1789, 28 U.S.C. 1333, describes an important federalism in the judicial development of the Union. In extending exclusive jurisdiction of District Courts to admiralty while saving to suitors common law remedies, a dual system is visited upon development of the law maritime. Individual states and the United States are assigned certain areas of concurrent responsibility: jurisdiction of courts and arenas for legislation. *The Hamilton*, 207 U.S. 398 (1907).

Where, in certain provinces of admiralty concurrent action might lead to confusion and impede continuing development of the maritime law, Congress may act with characteristic supremacy to "occupy" a specific area of the field. Where Congress does not act, the states are competent to move. Even on subjects that Congress has reached, states may *supplement* the substantive effect. Assuming *arguendo* that the combined national-state effort to combat oil pollution or surrounding waters lies within the arena of admiralty cognizance, the State Act is nonetheless valid, for reason that it is not inconsistent with the Federal Act, but supplements that Act (and, in a real sense, makes it workable).

It is difficult to consider Federalism outside of its historical perspective. Its history describes a classic "pendulum" effect. From de Toqueville's confident prediction of the decline of federal power and "a lively sense of independence" on the part of the states in 1835, 1 de Toqueville, DEMOCRACY IN AMERICA 414-415 (Bradley ed. 1945), to the observation of Bryce at the end of the 19th Century that, while a state began as a self-sufficient commonwealth, it is "now merely a part of a far grander whole, which seems to be slowly absorbing its functions and stunting its growth," 1 Bryce, THE AMERICAN COMMONWEALTH 562, (3rd ed. 1893), the arc of the pendulum is easily followed.

Federalism had its beginning, probably, before the Revolution. Great Britain's colonies were accustomed to sustaining themselves and handling their own affairs of domestic legislation and administration. This sense of local autonomy led to continuing conflict between the individual colonies and the mother country and between the colonies themselves. The style of what would become known as "states' rights" was set early. Schmidhauser, *"States' Rights" and the Origin of the Supreme Court's Power as Arbiter in Federal-State Relations*, 4 Wayne L. Rev 101 (Spring 1958).

One of the central issues of the Constitutional Convention was confederation vs. federalism. On April 8, 1787, James Madison wrote Governor Edmund Randolph of Virginia: "I hold it for a fundamental point, that an individual indepen-

dence of the States is utterly irreconcilable with the idea of an aggregate sovereignty. I think, at the same time, that a consolidation of the States into one simple republic is not less attainable than it would be inexpedient. Let it be tried then whether any middle ground can be taken . . . " 2 THE WRITINGS OF JAMES MADISON, 337, 338, (Hunt ed. 1901).

The "middle ground" speculated upon by Madison became known as the Connecticut Compromise at the Convention. It provided for equal representation in the Senate, thereby preserving a small but important sovereignty to the states. See, 1 Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 161 (Rev. ed. 1937); Mason, THE STATES RIGHTS DEBATE 35-36 (1964). Prevalent fears that the Supremacy Clause and constitutional ratification by the people instead of state assemblies would result in swift abolition of all states' rights should have been assuaged by general wording of the Constitution rather than specific clauses. The Constitution presumes continued existence and functions of the states, from provisions for state approval of proposed amendments to the guaranty to each state of a republican form of government. Nonetheless fears mounted, prompting a storm of controversy. Jefferson finally persuaded Madison to introduce amendments during the First Congress. The ensuing campaign to secure state and individual rights was both a success and a failure to amendment sponsors. Sweeping declarations of individual freedom were won, but a clear-cut line of demarcation between state and Federal authority never materialized. What did result, from this effort, however, was the Tenth Amendment (A 94). See, also, Mason, *The Supreme Court and Federalism*, 44 Texas L. Rev. 1187 (1966). It has been the fulcrum of the federalism controversy ever since.

The Tenth Amendment was early deemed to be no more than a pacifier to quiet "the excessive jealousies which had been excited." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 199 (1819). Chief Justice Marshall's pro-Federal ideas were probably necessary at the time, when a post-Revolutionary "back-lash" whipped across the states. Thus, he

reasoned, the sovereign character of the states underwent a change when they converted their league into a government; and because of the Supremacy Clause, their previous character would never be the same. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 82-92 (1824).

This position drew equally strong protest. Protest was loudest where hull-plates of the ship of state were weakest. Four years after *Gibbons v. Ogden*, pressure was mounting in South Carolina. "That argument cannot be sound which necessarily converts a government of enumerated into one of indefinite powers, and a confederacy of republics into a gigantic and consolidated empire." 2 WRITINGS OF HUGH SWINTON LEGARE 102 (1845).

In 1835, the pendulum abruptly swung the other way. Roger Taney began a 30-year tenure as Chief Justice, and opinions of the Court redefined federalism in terms more favorable to the states, i.e., *The License Cases*, 46 U.S. (5 How.) 590, 671 (1846), *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The Civil War changed stroke. Appomatox, together with the Thirteenth, Fourteenth, and Fifteenth Amendments, effectively overruled Chief Justice Taney. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872). But adherents to the concept of states' rights gradually rebuilt their position, and in 1918, the Court inserted the word "expressly" before "delegated" in the Tenth Amendment to place manufacturing, agriculture, and labor relations beyond Federal control. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). The tenor of the court is worth noting:

> In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not *expressly* delegated to the National Government are reserved . . . 247 U.S. at 275 (emphasis supplied)

Two decades later "expressly" was again read into the Constitution to defeat certain New Deal legislation in a series

of cases, e.g. *United States v. Butler*, 297 U.S. 1 (1935), until Justice Stone, who strongly dissented in the New Deal cases, finally prevailed. In *United States v. Darby Lumber Co*, 312 U.S. 100, 123 (1940), he observed: "Our conclusion is unaffected by the Tenth Amendment. . . . There is nothing in its adoption to suggest that it was more than declaratory of the relationship between the national and state governments. . . ."

There have been signs, recently, that the Tenth Amendment has taken on somewhat broader significance to the Court and to Congress. In the maritime area, "uniformity" is a euphemism for Federal hegemony. The plateau of case law in this respect reached its peak with *Jensen, Knickerbocker Ice*, and *Washington v. W. C. Dawson & Co.* 264 U.S. 218 (1924). It is submitted that this trend can go no further without judicially rewriting Article III, Section 2, by inserting "exclusively" before "extend," and ignoring the Judiciary Act altogether. Thus, in *Just v. Chambers*, 312 U.S. 383 (1941), and *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943), uniformity as a standard for measuring state legislation, i.e., imposition of Federal values on state substantive statutes, became considerably less than a categorical imperative.

More recently, the Court enumerated the wide range of areas left open to the States in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-374 (1959), noting that:

> [T]o claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplication of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce . . . . [I]f one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and *Chevron Oil Co. v. Huson*, U.S. , 30 L.Ed.2d 296 (1971), State-Federal team work and joint responsibility for providing legal remedies under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §§ 1331 *et seq.*, is recognized. No challenge of Congress' power to apply state substantive law is tolerated by either case. For analogous reasons, no challenge of Congress' power to conceive and effect a joint effort for oil pollution control should be tolerated here.

(3.)

The "gap theory" of State law filling gaps in Federal statutory schemes is alive and well in *Rodrigue*.

The State of Florida argued in the District Court that the scheme described in the Federal Act left intentional loopholes or "gaps" to be filled-in by state legislation in order to accomplish congressional intent. The District Court dismissed this argument on authority of *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970), which, according to the District Court (A 44) "clearly puts such a theory to rest."

In reaching such conclusion, the District Court overlooked the lesson of Rodrigue v. Aetna Casualty & Surety Co., *supra*, where a Federal Act incorporated state substantive statutes by reference and adopted them as federal law. "[L]anguage [of the House Conference Report] makes it clear that state law could be used to fill federal voids." 395 U.S. at 358.

This concept was commented on shortly thereafter in Chevron Oil Co. v. Huson, *supra*, where it was noted that in *Rodrigue* the Court clarified the scope of application of federal law and state law under the Lands Act, 43 U.S.C. § 1333, and "[b]y rejecting the view that comprehensive admiralty law remedies apply under § 1333(a)(1), we recognize that there exists a substantial "gap" in federal law. Thus state law remedies are not "inconsistent" with applicable

federal law. Accordingly we held that, in order to provide a remedy for wrongful death, the "gap" must be filled with the applicable body of state law under § 1333(a)(2)." 30 L.Ed.2d 296 at 302.

The Court also noted at 30 L.Ed.2d 304 that in the Lands Act Congress had specifically rejected uniformity and provided for application of state remedies. This is no less true of the Federal Act in the case *sub judice*.

The Florida Act speaks to local action in coordination with National action. It fills "gaps" in execution of the contingency plan, and in providing remedies for (a) state cleanup claims and (b) private party damage claims. Moreover, there is a strong indication in the Federal Act that it is not part of the general body of maritime law at all.

In denying Florida's "gap" theory interpretation of the State Act on the basis of the Court's holding in Moragne v. States Marine Lines, Inc., *supra*, the District Court was in error. The "gap" theory is an integral part of Congress' expression of federalism in the Federal Act. It has a place in our jurisprudence, and a secure place in this case.

CONCLUSION

For reasons and under authority set forth above, this Court is requested to reverse the District Court judgment and declare the Florida Act to be a valid expression of the police power of the State, and a valid response to the congressional policy for combatting oil pollution of coastal waters of the United States and the State of Florida.

Respectfully submitted,

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